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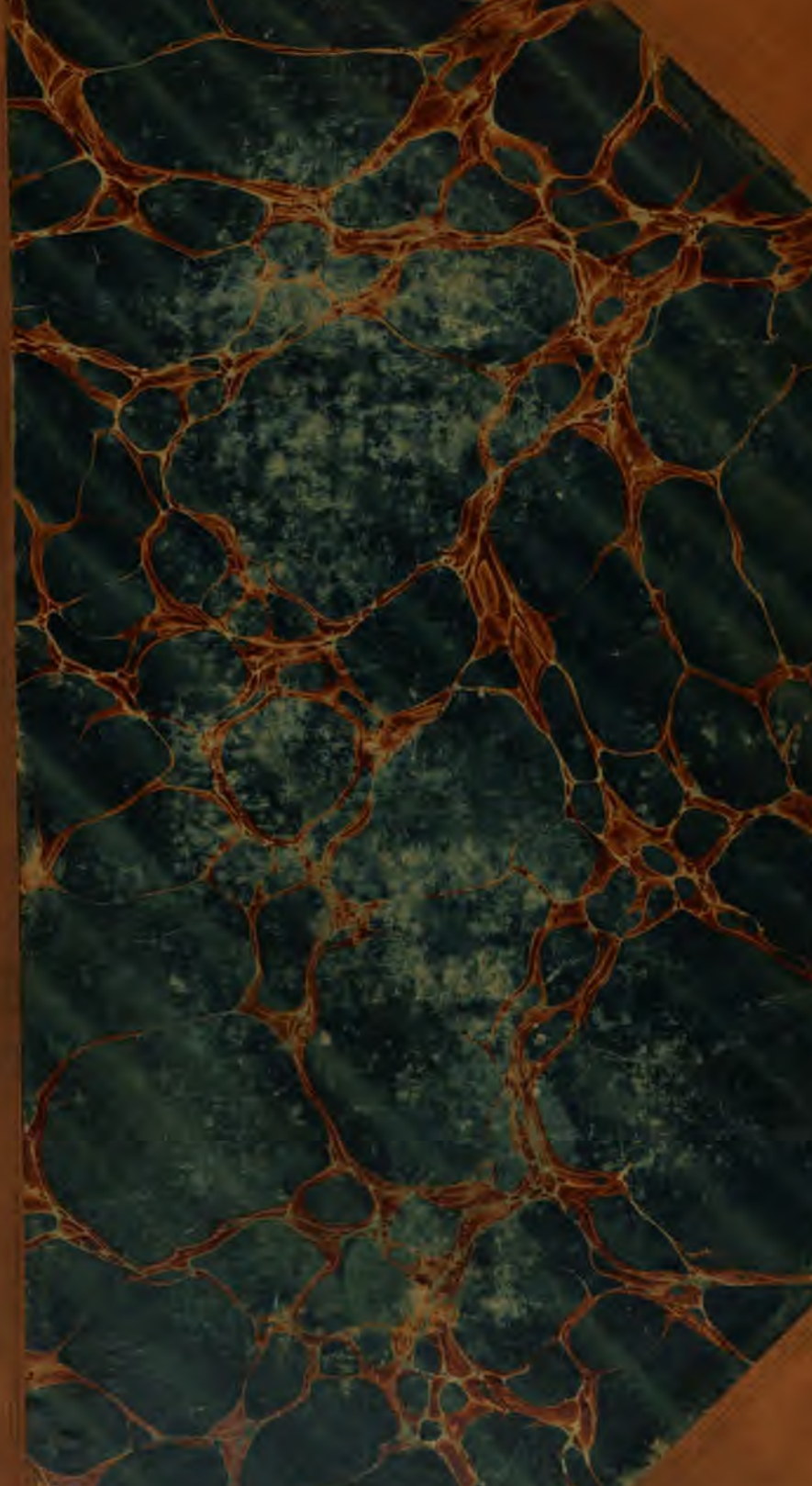
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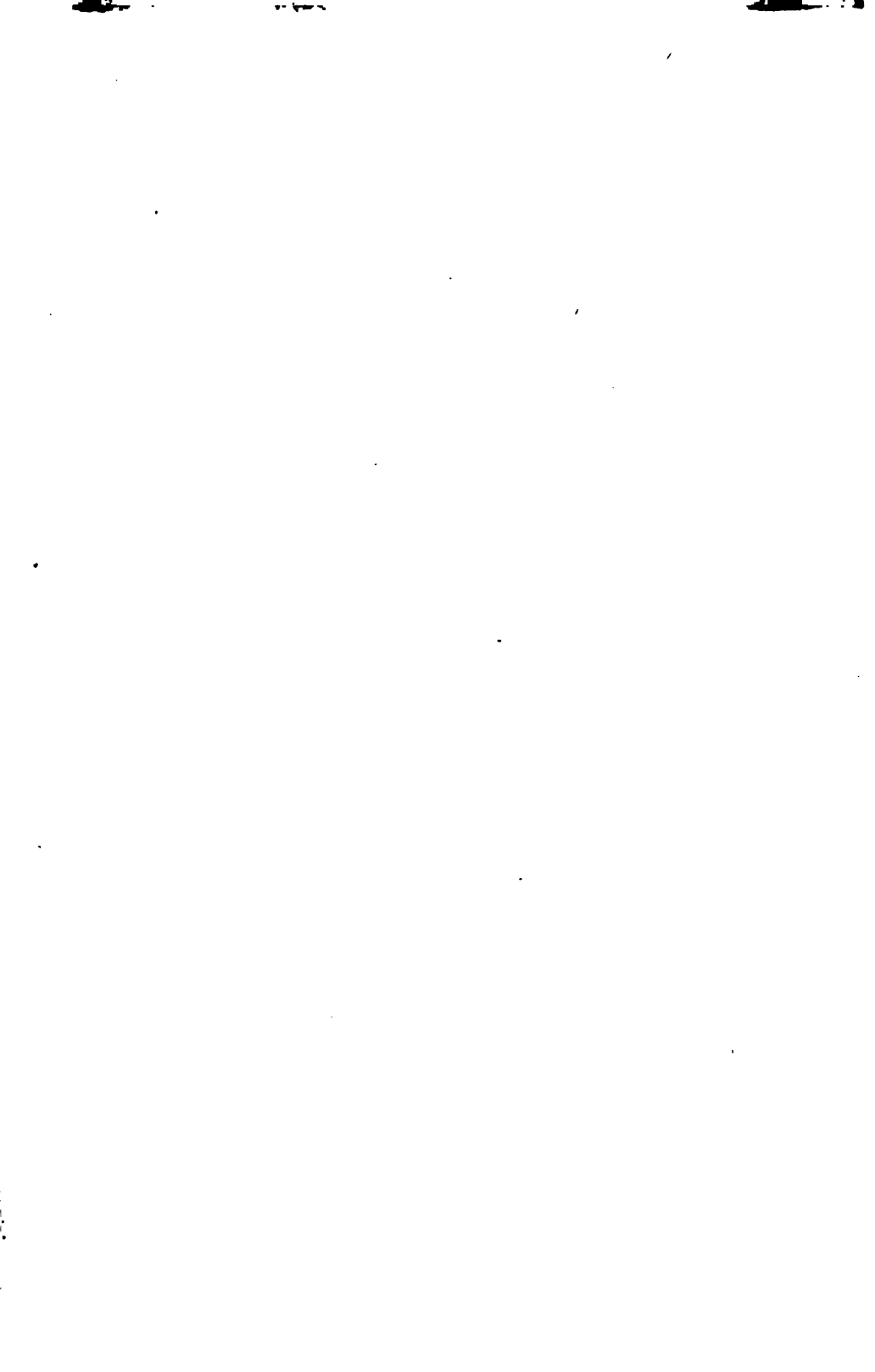
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John Brown.



REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL.

DURING PARTS OF THE YEARS 1886 AND 1887.

**REPORTED UNDER THE AUTHORITY OF
THE LAW SOCIETY OF UPPER CANADA.**

VOLUME XIII.

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ONTARIO APPEAL REPORTS.

MCVEAN v. TIFFIN.

Mechanic's lien—Mortgage—Priority of registered mortgage over lien subsequently registered.

In an action to enforce a mechanic's lien under R. S. O. ch. 120, a reference in the usual form was directed to the local master at Chatham, to inquire whether any person besides the plaintiffs, other than prior mortgagees, had any incumbrance, &c., upon the premises in question. In proceeding under this reference, the master made a number of persons, including the appellants, parties in his office, and caused them to be served with notice "T," which erroneously recited the judgment as directing an inquiry as to incumbrances generally. The appellants thereupon petitioned to discharge the master's order upon the ground that they were prior mortgagees, and hence not necessary or proper parties to the action.

It appeared that the appellants registered their mortgage before any of the work was done or materials supplied for which the plaintiffs claimed, and had advanced the full amount of the mortgage money some months before the plaintiffs' lien was registered, though a portion was advanced after they had commenced work or supplied materials. The mortgagees had no notice of the plaintiffs' lien.

Held, reversing the judgment of the Court below, that the appellants' claim was prior to that of the plaintiffs, and that they were not proper parties to the action, being excepted by the terms of the judgment, nor was the master warranted in entering upon any inquiry as to the amount advanced by them subsequent to the commencement of the work.

Richards v. Chamberlain, 25 Gr. 402, and *Hynes v. Smith*, 27 Gr. 150, referred to.

THIS was an appeal by the defendants—The Agricultural Savings and Loan Company—from an order of the Chancery Division of the High Court of Justice, made by Proudfoot, J., on the 15th April, 1885, dismissing with costs their petition, praying that the order of the local master at Chatham, adding them as parties in his office might be dismissed; and came on to be heard before this Court, on the 23rd of October, 1885.*

**Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.,
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Bayly, Q. C., for the appellants.

Clement, for the respondents.

December 27th, 1885. OSLER, J. A.—This is an appeal from an order of Mr. Justice Proudfoot, dismissing the petition of the Agricultural Savings and Loan Company to discharge the order of the master at Chatham, making them parties in his office.

The action was brought under the Mechanics' Lien Act, R. S. O. ch. 120, by the contractors against the owner, to enforce a lien. It was commenced on the 5th July, 1884. The decree was made on the 26th November, 1884, and directed a reference to the master in the usual way to inquire whether any person or persons and who, other than the plaintiffs, except prior mortgagees, had any incumbrance, &c., on the premises in question.

The master caused a number of persons, including the appellants, to be made parties in his office, and on the 16th February, 1885, issued the usual notice T to incumbrancers, which, however, wrongly recited the decree as directing an inquiry as to incumbrancers generally, without the exception as to prior mortgagees. By this notice persons so made parties were warned that if they desired to discharge the order making them parties, or to object to the decree, they must do so within fourteen days from the service and that, failing to do so, they would be bound by the decree or judgment and further proceedings, as if they had been originally parties to the suit.

The appellants accordingly petitioned to discharge the order on the ground that they were prior mortgagees, and, therefore, under the decree, not necessary or proper parties to the suit.

On the 15th April, 1885, the order appealed from was made, dismissing the petition with costs.

No written judgment was delivered, but it was stated on the argument before us that the lien holders claimed to be prior incumbrancers as to part of the moneys secured by the appellants' mortgage, as the work in respect of which the

lien arose was commenced before the whole of the mortgage moneys had been advanced, and that this was held to be a question which might properly be inquired into in the master's office under the decree.

The appellant's mortgage bears date the 12th, and was registered on the 15th September, 1883. It purports to be security for a loan of \$10,000.00. Of this sum \$5,870 was advanced, at or about the time it was given, to discharge prior incumbrances, and for other purposes: and the balance was to be advanced to the mortgagor from time to time during the progress of the work on the building then about to be erected by him on the mortgaged premises. The whole of the balance was thus advanced between the 24th October, 1883, and the 30th January, 1884.

The plaintiffs were the contractors for the erection of this building, or part of it, and the work in respect of which the lien was claimed, was done between the 17th October, 1883, and the 7th April, 1884. They did not register their lien until the 8th of April, 1884.

From the affidavits filed by the plaintiffs on opposing the petition, it is manifest that it was intended to make the appellants parties to the suit under section 7 of the Act as being prior mortgagees, and with the view of limiting their priority over the lien to the selling value of the land, less the increase in such value occasioned by the work, &c.

This position was, however, expressly abandoned on the appeal before us, and is no doubt quite untenable for two reasons, (1) because the decree excludes prior mortgagees from the reference, and (2) because they should have been made parties to the action in the first instance, and within the time limited by the Act, if it was intended to affect their interest as prior mortgagees, under section 7. *Bank of Montreal v. Haffner*, 10 A. R. 592; *Douglas v. Chamberlain*, 25 Gr. 288.

The plaintiffs are, therefore, obliged to contend that the mortgagees, though their mortgage was registered, and a large portion of the money advanced before any

of the work had been done in respect of which the lien is claimed, are, as regards the advances made after the commencement of the work, in the position of subsequent incumbrancers, and were as such properly made parties under the decree. This contention seems to have been suggested by one of the affidavits filed on behalf of the mortgagees, which sets forth in apparently needless detail the manner in which the mortgage money was advanced.

This affidavit is not answered, nor do the plaintiffs allege that the mortgagees had actual notice of the claim for the lien, or that they were made parties with any view of proving that they had such notice, even if that could avail the plaintiffs.

I am of opinion, with great respect, that the appeal should be allowed on the ground that the appellants are mortgagees or incumbrancers prior to the plaintiffs, and that there was nothing before the master or my brother Proudfoot to shew they were not, or to warrant the inquiry into which the master proposed to enter as to their position.

The authorities to which I shall refer, and with which I agree, are, I think, entirely in their favor.

Their mortgage was registered before any of the work was done, and the whole amount secured was advanced long before the plaintiffs registered their lien.

The Act provides, (section 4) that a statement of the claim may be filed in the registry office *before*, or during the progress of the work, or within thirty days after its completion, and that when registered, the person entitled to the lien "shall be deemed a purchaser *pro tanto*, and within the provisions of the Registry Act."

These clauses appear to me to indicate very plainly that, although as between owner and contractor, the lien may by force of section 3, exist from the time of the commencement of the work, yet that if the latter desires to preserve his position and establish a priority over subsequent purchasers or mortgagees, he must register his lien, which the Act enables him to do even before the commencement of

his work. There is otherwise, as it seems to me, no force in the declaration that on registration of his claim the lien holder shall be deemed a purchaser *pro tanto*. Registration serves two purposes, one to maintain the lien holder's priority, and the other to extend the time within which he may take proceedings to realise his claim. If the latter was the only object to be served by it, the provision as to the effect of registration in making him a purchaser *pro tanto* would be useless, since in that case the lien, so long as it was sued for within the limited time, would always be paramount to any interest arising after it came into existence.

In *Richards v. Chamberlain*, 25 Gr. 402, (1878) the bill was by the contractors against the owner and mortgagee. The building in respect of which the lien was claimed, was in course of erection at the date of the mortgages, of which there were four of \$5,000 each. The mortgage money was not then advanced, but subsequently, from time to time during the progress of the work. The Chancellor (Spragge) in giving judgment on the motion for decree on bill and answer, said :

"The argument for the plaintiffs is that the mortgagees saw the work being done and materials for it furnished by them, and must be taken to have known that there-upon a lien attached in favor of the plaintiffs, and should have seen to the application of their further advances, and should have paid the plaintiffs, or have seen that the owner of the land did so. But this would be holding the mortgagees to a very strict course—would be holding them bound to be very vigilant—while they, the contractors, the parties to receive the money, were very supine. By the registration of the mortgage, they had notice of its existence, yet they took no steps for their own protection. They might have registered a statement of claim before or during the progress of their work. The effect given to such registration is that the person registering is deemed a purchaser *pro tanto*, and is within the provisions of the Registry Act."

In *Hynes v. Smith*, 8 Pr. R. 73 (1879), the plaintiffs filed their bill to enforce a lien, and under a decree similar

in terms to the present, the master refused to make certain mortgagees parties, on the ground that they were not subsequent incumbrancers.

The plaintiffs' work was commenced before, but their lien was not registered until after the registration of the mortgages.

On appeal from the order of the master, the Chancellor held that under the Revised Act the lien holder had no priority over a mortgage subsequent in point of time to the commencement of the work, but registered before the registration of the lien.

On the rehearing, 27 Gr. 150, this decision was affirmed. Proudfoot, V. C., *diss.*; Blake, V. C., said :

"If he (the contractor) did not register, he is not brought within the protective provisions of the Registry Act, and although the lien may attach for a time as against the owner of the premises, the provisions of the Registry Act, which, if duly invoked in his favor, might have preserved his priority, when neglected, serve to postpone his claim to those who have brought themselves within its operation."

In the present case, although according to *McDonald v. Rogers*, 9 Gr. 75, which Mr. Clement relied upon, the appellants might have raised the question of their priority by appeal from the master's report, they were, nevertheless, as that case also shews, strictly within their right in moving to discharge the order making them parties.

Both on the evidence and on the authorities, I consider that nothing has been shewn to disturb their priority, or to support the master's order in making them parties as subsequent incumbrancers. Something was said on the argument as to an intention to prove in the master's office that the appellants had actual notice of the plaintiffs' claim, whatever that may mean in reference to an unregistered lien. This, however, was a mere suggestion of counsel, unsupported by anything in the affidavits.

HAGARTY, C. J. O., BURTON and PATTERSON, JJ.A., concurred.

Appeal allowed, with costs.

WHITING ET AL. V. HOVEY ET AL.

Chattel mortgage—Bills of sale Act—Sufficient description of goods—Change of possession—Incorporated company, assignment by—Stock in trade—Locality of goods &c.

An incorporated trading company being in insolvent circumstances, the president and secretary on the 15th August, 1884, in pursuance of a resolution of the board of directors joined in executing to the plaintiffs—one of whom was president of the company—as trustees for creditors, an assignment of all the real and personal estate of the company, stock in trade, &c., “and all other, the personal estate and effects whatsoever and wheresoever, and *whether* upon the premises where the company’s business is now carried on *or elsewhere* which the company is possessed of or entitled to in any way whatsoever;” which assignment was duly filed on the following day, and the business was continued as before until the 23rd of the same month, when letters were written by the secretary in which the trustees were mentioned, and five days later Whiting, one of the trustees, demanded and received from the manager of the company the keys of the post office box, and directed the manager to keep the concern running. On the 4th of October the first of several executions against the goods of the company was sued out and placed in the sheriff’s hands: *Held* (1), That assignments for the benefit of creditors were until 48 Vict. ch. 26 (O), within the Act relating to chattel mortgages and bills of sale: R. S. O. ch. 119.

Robertson v. Thomas, 8 O. R. 20, overruled.

Held (2), That although the description of the property intended to be assigned in this case was not sufficient within the Act; yet that under the circumstances there had been such an actual and continued change of possession as to defeat the executions against the company.

Partes v. St. George, 10 A. R. 496, and *Scribner v. Kinloch*, 12 A. R. 367, followed.

Semle, A description of property in a bill of sale or chattel mortgage as “the stock-in-trade” of the grantor in a specified locality, such as his store or warehouse in such a place or street is sufficient.

Nolas v. Donnelly, 4 O. R. 440, observed upon.

McCall v. Woolf, Sup. Ct. Can. [not yet reported] followed.

Held (3), [BURTON, J. A., dissenting], that the directors of an incorporated trading company had power to authorise the execution of an assignment for the benefit of creditors of the company, and that the defendants, execution creditors, as strangers to the company could not object that the authority of the shareholders was not given or that they had not ratified the deed.

Donby v. Holmwood, 4 A. R. 555, distinguished.

Per BURTON, J. A., that the directors could not do so without the sanction of the shareholders.

The judgment of the Court below reversed, BURTON, J. A., dissenting.

THIS was an appeal by the plaintiffs from the judgment of Ferguson, J., reported 9 O. R. 314, where and in the present judgments the facts and authorities cited, are fully set forth; and came on to be heard before this Court on the 1st of March, 1886.*

* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

McMichael, Q. C., and *H. K. Wilson*, Q. C., for the appellants.

Robinson, Q. C., and *Hall*, for the respondents.

April 20, 1886. HAGARTY, C. J. O.—I only propose to discuss one branch of this case, as I agree with the judgment of my brother Osler on the other points.

I think it very necessary to preserve the obvious distinction between the case now before us and a suit for the adjustment of differences between the stock holders of a trading company and the body of directors.

We have only one question to decide. Execution creditors claim certain chattels as the property of the company against whom they have execution. An instrument is produced by the plaintiffs professing to vest these chattels in them on certain trusts for the payment of debts, the surplus to revert to the company.

On the face of the instrument appear the facts that the company cannot pay all its debts in full, and that they are assigning all their real and personal estate therefor. This is a purpose to which the company could legally and properly devote and apply all their assets, real and personal. They have in effect made it over to the plaintiffs to apply it to the same purposes. The instrument is properly executed as the act and deed of the company.

I can find nothing in the evidence as to any assent or dissent on the part of the shareholders to this assignment. The first mention in the appeal book is in the judgment that it was argued that "inasmuch as the directors of the company were in no way authorised to make it, there being no by-law or any assent of the shareholders, or any authority from the shareholders at a meeting of shareholders or otherwise, the directors had no power to make an assignment of all the property of every kind of the company." My learned brother only notices the point but does not decide it. It is made one of the reasons against the appeal.

It is much to be regretted, if the defendants relied much

on this argument, that it should be apparently wholly unnoticed in the long examination of witnesses from whom much important evidence as to the stockholders might have been obtained; after adjournment to another day to hear the general argument, the point appears to be raised before the learned judge.

It appears to me that as against these execution plaintiffs the assignment by the company was a sufficient title, and that the whole burden of impeaching it and shewing that it did not pass the property seized, was on the execution plaintiffs.

I am unable to accept the argument that it was necessary for the trustees to prove as a condition precedent to the validity of the assignment, a resolution or approval by the shareholders. As far as the evidence is reported to us it fails to shew either assent or dissent, and there is only shewn an apparently legal assignment duly executed by the company.

If an assignment by a company of all its property to trustees to pay debts must, on the face of it, be an illegal act, then of course the objection is well taken.

What is the transaction in substance? It is merely doing, through the instrumentality of trustees, exactly what the law would require of a company unable to pay in full, viz., the application of all its assets to pay its just debts. The result would be precisely the same—in either case the company would be stripped of all its assets.

It is conceded that the directors' function is the management of the business and affairs of the company, but is argued that it is no part of such function to do an act which in effect stops all the operations by thus disposing of all the assets. I think that it is clearly a part of the business, within the words of the statute giving them "full power in all things to administer the affairs of the company," to pay its debts and to apply its assets so far as they can extend to such purpose: 40 Vict. ch. 43, s. 32 (D.)

If the directors of a company pressed by creditors and unable to pay in full were aware that some executions

would issue against the company in say five days and sweep away all the assets, could they not sell the assets by public auction for the express purpose of turning them into money to pay all creditors alike, or must they wait to obtain the sanction of a body of shareholders, who might be scattered far and wide impossible to be collected in a meeting in time? If the defendants' argument be sound the absence of such assent so obtained would be an insuperable bar.

It would also apply to the case of a trading company assigning all existing assets to pay debts, even if only ten per cent. had been paid up and ninety per cent. of the capital stock still available for future operations.

We are not embarrassed by any consideration as to a corporation selling its franchise, or doing any act by which the public interest, or any contract or duty with or to the public, may be affected. It is the act of a trading partnership under the Joint Stock Act.

There was nothing to prevent this company from carrying on business after this assignment if they could find funds, and we find that they were empowered to raise \$50,000 more stock.

It has been asserted on the authority of the well known case of *Oakes v. Turquand*, L. R. 2 H. L. 325, that such a company is a trading association governed by the ordinary rules of partnership, except so far as special conditions may be inserted into their constitution by the legislature, or by their own articles of association.

It was, as I understood, conceded in argument that if the shareholders had assented then the objections to the assignment would fail.

I am not prepared to agree that such assent could only be shewn by formal resolutions at a properly constituted meeting.

I think that assent may be evidenced by acts and conduct of shareholders, and their subsequent proceedings can be referred to to shew ratification on their part. I refer to such cases as *Grady's case*, 1 D. J. & S. 492, before Lord

Westbury ; *Phosphate Lime Co. v. Green*, L. R. 7 C. P. 43 ; recognised in *Ashbury v. Watson*, 30 Ch. D. 379.

The facts in the present case were peculiar. The assignment was executed in Brantford on the 15th August, 1884. There was of stock subscribed about \$47,500. Of this amount over \$43,000 was held by residents of Brantford. Of persons called at the trial as witnesses acting in or under the assignment, we find holding amongst them nearly \$40,000 of the stock. The directors held amongst them nearly \$32,000 of the stock. Mr. Whiting, a director and also an assignee, held about \$29,000. Contemporaneously with the assignment a deed of composition was prepared, which the creditors were asked to execute, signed by between 30 and 40 of the creditors, but it failed to meet the approval of all, and after about a fortnight it was abandoned and the assignment to the plaintiffs finally acted on.

Some time in September, some weeks apparently before the execution matured, the trustees announced by public advertisement a sale of all the property. This sale took place by public auction about October 6th, and the whole property, real and personal, was sold to a Mr. Dowling for \$26,500. He paid \$10,000 which, as far as I can understand, was the amount in cash over certain mortgages and liens which he had to meet. This sale was not objected to by the execution creditors, the earliest of whose writs seems to have been issued 4th of October.

The cash proceeds are said to have been paid into court by arrangement.

Now these proceedings are stated to have been notorious in Brantford, in their nature we may assume them to have been so. We thus have \$40,000 of the \$47,500 of the stock clearly shewn to have been assenting directly to the sale, and over three-fourths of the whole body of stockholders living in the place where it was all done.

We must, of course, remember the distinction between ratifying or assenting to an act *ultra vires* of the company, and one within its powers.

I find it hard to divest myself of the idea that the objection here urged as to the non-assent of stockholders does not properly come from these defendants.

On this I should refer to the very instructive remarks in the judgment of Blackburn, J., in *Taylor v. Chichester R. W. Co.*, L. R. 2 Ex. (in Error) 378. He points out the difference between objections raised by the shareholders as *ultra vires* of the directors to bind them, and the objections of third parties. This case was in 1867, before the Judicature Act:

"I think that any objection made only on the ground that it affects the interest of the shareholders can only be made on behalf of the shareholders and therefore cannot be made in a court of law at all, but must, if raised at all, be raised in a court of equity. It might perhaps be enough to say that on this record there is no allegation that there is any shareholder who did not acquiesce in the promoting of this bill, but I think no such allegation would have made the plea good at law as the objection would concern no one but the shareholder, who is not and cannot be a party to the action at law."

It seems to me that it was in these proceedings the business of the shareholders on their own behalf to actively interpose to restrain this action of their directors, and that it is not the right of these defendants to raise it on their own behalf.

If the defendants' contention be right, the sale by auction to Dowling would be open to the same defect in title.

A sum has been paid by the purchaser in cash amounting to nearly double the amount of the executions. If this sale be not impeached, the proceeds will go to pay the debts of the company. All the facts in evidence point to the conclusion that the whole proceedings have been with general assent. If so, the result will be singularly absurd that the execution creditors succeed in having the assignees' title declared defective in consequence of the failure of proof of assent, while all the parties really interested will get the benefit of the sale and its proceeds.

The clauses in the Joint Stock Act as to borrowing

powers and the pledging of property to secure money borrowed, requiring a two-thirds in value of assent of stockholders, do not seem to me to affect this question.

My brother Osler has referred to the authorities and I adopt his reasoning upon them.

I took part in the judgment in *Donly v. Holmwood*, 4 A. R. 555, in this court.

I agree in the point there decided that an action for calls on unpaid stock could not be brought against a shareholder by an assignee under the Insolvent Act to whom the company had professed to make the statutable assignment.

I need hardly point out the obvious difference between the statutable assignment, with all consequences criminal and civil, and the course adopted here.

With the additional information derived from the investigation of this case, I think some of the expressions of the learned Chief Justice, who pronounced the judgment of this court are too wide in their application to the general powers of directors.

PATTERSON, J. A.—I do not propose to discuss the questions raised on this appeal at any great length because I have had an opportunity of seeing the judgment prepared by my brother Osler, and I believe my views agree with those expressed by him.

I agree with the learned judge in the court below in the opinion that the making of the deed of assignment to the defendants was not accompanied by an immediate delivery of the goods, and that no change of possession took place, of such a character as would satisfy the Bills of Sale Act, until a number of days after the making of the deed; and that, therefore, if the title of the defendants, as against the execution plaintiffs, depended on the deed alone the executions must prevail by reason of the insufficient description of the goods.

But the learned judge's attention does not appear to have been directed to the effect of what occurred after the company gave up hopes of effecting the composition. From

that time forward I think we may properly hold that there was an actual and continued change of possession. It is not very material to know the precise time at which the actual delivery and actual change of possession took place.

The form of the issue, following the practice established in England under a statute which has not been enacted in this Province, makes the question of title relate to the dates of the seizure by the sheriff, and not to that of the delivery of the writ to the sheriff to be executed. The dates are the 4th of October under one writ, and the 6th under others. Before either of these dates the change of possession had taken place, and I understand it to have been effected by the act of the company, or of some one acting for the company, handing over the possession to the trustees, and not by the trustees assuming by their own act and without the active interference of the company to seize the goods, as was the case in *Parkes v. St. George*, 10 A. R. 496.

I expressed my opinion in that case that, although a grantee could not by any act of his own in seizing the goods, give himself a better title than he had under his deed, yet the grantor might by making a delivery which would operate as a conveyance of goods capable of passing at law by delivery, effectually cure a prior defective conveyance. See pp. 535, 6. I refer also to my remarks on the same subject in *Smith v. Fair*, 11 A. R. 755, 758.

The power to make a valid assignment for the company is disputed, and has to be discussed ; but, setting that question aside for the moment, I have no difficulty in holding, as a fact, that whenever the change of possession may be said to have occurred, it amounted to a delivery of the goods as the act of the company to the trustees, and vested the goods in the trustees subject to the trusts declared in the deed of assignment.

Nor do I perceive any sufficient reason for hesitating to hold that there was an actual change. The trustees had made more than one change in the conduct of the concern which must have been obvious to any observing person.

One striking instance was the employment of Mr. Galloway, which is referred to in the passage I am about to read from the evidence of Mr. Hale :

Q. Then Mr. Galloway was put in charge instead of Mr. Buchanan ? A. They came up on the morning of the 17th of September, with Mr. Galloway, and placed him in charge of the office, safe, mail and papers, as I understand it, full charge of the whole business ; nothing was to go out without his sanction : no goods to be shipped or anything of that kind to be done without his sanction. Mr. Buchanan was out of town at the time. At that time Mr. Cockshutt said to me, on introducing me to Mr. Galloway and telling me what his duties were to be, that I was to remain there as mechanical superintendent like looking after the men. I will not be certain that he used the words "mechanical superintendent," but I was to remain there and look after the men, and the force must be cut down as small as possible ; that the business had been running long enough in that way, and the thing would have to be sold out. I think he asked me if anything further had been done about the composition deed when we first came into the office. I said that things were going on the same as usual : that nothing had been done about the deed.

Q. Did you receive any specific instructions before that date from either of the trustees ? A. No. He told me to come to his office that afternoon with a list of what men to keep, and not to let it be over ten or twelve. I went to his office that afternoon and took a list of names ; and I see by the time-book that on the 22nd September those men commenced anew.

Q. I show you the time-book. Now where does the change take place in the time-book ? A. (Witness points out the entry, page 68.) This is the first pay-roll after the discharge. (Pay-roll ending 4th of October, commencing 22nd September.) That is after the instructions were given to cut down, after Mr. Galloway was installed.

This seems to have been followed up by the advertisement for the sale by auction. It was issued in September and the sale took place on the 8th of October, with the assent of the execution creditors on whose writs the sheriff had seized on the 4th and the 6th.

The advertisement gave notoriety to the fact of the change of possession ; and if there were any dispute on the

subject, one cannot doubt that the execution plaintiffs would be found to have known all about it, and that if it had been the case that the change of possession, though actual as between the company and the assignee, was not apparent to a casual observer, that circumstance could not benefit the parties who had knowledge of it. See *Danford v. Danford*, 8 A. R. 518, where the head-note scarcely conveys the effect of the decision.

The question of the power of the directors to make the assignment in the name of the company, which was not touched by the judgment in the court below thus becomes the governing question.

By the statute 40 Vict. ch. 43, sec. 26, (D.) "the affairs of the company shall be managed by a board of not less than three nor more than fifteen directors;" and sec. 32: "The directors of the company shall have full power in all things to administer the affairs of the company, and to make or cause to be made for the company any description of contract which the company may by law enter into." The section goes on to empower the directors to make by-laws not contrary to law, nor to the letters patent of the company, nor to this act, respecting stock, dividends, directors, officers, meetings of the board of directors and of the company, penalties and forfeitures admitting of regulation by by-law, "and the conduct in all other particulars of the affairs of the company." These by-laws are declared to require confirmation at a general meeting of the company, and the section provides that a special meeting of shareholders may at any time be called by one fourth part in value of the shareholders for the transaction of any business specified in the requisition and notice calling the meeting. Power is thus given to the shareholders to interpose, and, I assume, to control the action of the board of directors, but I find nothing to require the directors to call such a meeting or to consult the shareholders respecting the exercise of any part of the very large powers vested in the board.

It is not asserted that any by-law has been passed which touches the matters now in controversy, or modifies the

power and duty of the directors in all things to administer the affairs of the company. The facts recited in the assignment are not disputed.

They are that the company, in the course of their business, have contracted debts which they are unable to pay in full, and have in consequence agreed to assign their estate to the trustees for sale and ratable distribution among the creditors.

What are the directors of such a company to do when debts are pressing, and there is no money to pay with?

It cannot, in my judgment, be reasonably argued that the power in all things to administer the affairs of the company, does not extend to realising the assets and paying the debts as far as the assets will go. If the directors do not do that, the creditors will do it under their executions, and some will get paid in full, while others get nothing, unless proceedings are taken to wind up the company under the Winding-up Act, 45 Vict. ch. 23 (D).

What has been actually done, is to provide for the sale of the assets and the ratable distribution of the proceeds through the hands of trustees for the creditors.

I am unable to understand the argument that this is not part of the affairs of the company with which the directors are charged.

No language could be more wide or distinct than that of section 32: "Full power *in all things* to administer the affairs of the company, and to make or *cause* to be made for the company *any description* of contract which the company may by law enter into."

To argue that this means only matters connected with the business of the company so long as that business prospers or the concern is what is called a going concern, is to impose limitations which neither the language nor the object of the statute, in my opinion, admits. To say that the payment of the debts of the company, even though all the assets are absorbed in doing so, is not one of the affairs of the company, or not a legitimate

conduct of the business for which the company was formed, is to take what strikes me as a fallacious view of the subject. I do not see why the argument, if pushed to its conclusion, may not be used to maintain that *no part* of the assets of a trading corporation can be used by the directors for the payment of the business debts, even the debts incurred by the acquisition of those very assets.

To speak of such a step as one which virtually terminates the existence of the company, seems to me merely to put in another form the same fallacious proposition.

The fallacy partly consists in treating the existence of the company, and its ability to carry on business as convertible terms. We have a company, all whose assets are threatened with seizure under process, from which two results will inevitably follow, namely, the termination of the existence of the company, in the sense in which those words are used in the argument, and an unjust and unequal distribution of the assets among the creditors. The first of these results cannot be averted. It is not the assignment that strikes the fatal blow. The paralysis has come already, and the company is moribund. But the second result may be averted.

An individual trader, if he is honest and just, will do all he can to secure equality among creditors. Honesty requires the same course on the part of a trading corporation, and in making such a disposition of the assets as honesty requires, the directors act, as I apprehend, strictly within the powers vested in them by the statute.

It is scarcely necessary to remark that the existence of the corporation is not destroyed, nor are any of its franchises affected by the assignment.

I am aware that these views may seem to differ from some of those expressed in *Donly v. Holmwood*, 4 A. R. 555, by Moss, C. J., in delivering the judgment of this court. It happens, that although only two of the present members of the court took part in the hearing of that

appeal, the case, in one stage or another, came before us all, and we all concurred in the result. The actual decision was, that the directors of a company incorporated under a statute containing provisions similar to those I have quoted from the statute 40 Vict. ch. 43, (D.) could not, by executing an assignment in insolvency under the Insolvent Act of 1875, vest in the assignee in insolvency the right to continue in his own name an action commenced before the insolvency by the company against a shareholder for calls.

The judgment delivered by my brother Osler as that of the Court of Common Pleas expressly distinguished the case from that of an assignment like the one before us; and although more general language may have been used in this court; and although plausible reasons may not be wanting for contending that the *ratio decidendi* in the former case would invalidate the assignment in this case, I am not disposed to extend the decision beyond the circumstances to which it was applied.

The two most material points of distinction are, that that was an assignment in insolvency which carried with it, if valid, many consequences which do not follow such an assignment as this, and that there the contest was with a shareholder of the company, while here the title of a purchaser is, in effect, attacked, although no member of the company has interfered or complained of what has been done.

In my opinion we should allow the appeal, and give judgment that the goods were, at the time of their seizure, the property of the plaintiffs as against the defendants, with costs to the plaintiffs in the court below and in this court.

OSLER, J. A.—This is an appeal from the judgment of Ferguson, J., on the trial of an interpleader issue between the plaintiffs, as trustees or assignees for the benefit of creditors of the Farm & Dairy Utensil Manufacturing Company (limited), and the defendants as execution creditors of the company.

The judgment at the trial was for the defendants, and the plaintiffs appeal.

The plaintiffs claim under a deed of assignment for the benefit of creditors executed by the president and secretary under the authority of a resolution of the board of directors of the company, and the following short statement of the facts, other than those relating to the change of possession of the property conveyed, will suffice to explain the nature of the objections to their title.

The company was a manufacturing and trading company incorporated by letters patent, dated the 27th July, 1881, under the Canada Joint Stock Companies' Act, 1877.

Having become unable to meet their liabilities, a meeting of the board of directors was held on the 14th August, 1884, at which a resolution was passed that the company should make an assignment of all their estate and effects for the benefit of their creditors, and that the president and secretary should execute such assignment to Matthew Whiting, James G. Cockshutt and Charles Champion; that a deed of composition and discharge should then be prepared for execution by the company's creditors providing for the payment of fifty cents in the dollar on the amount of their claims, and that a clause should be inserted in such deed directing the trustees to re-assign to the company all the estate and effects in their hands, when the last composition payment should have been made.

In pursuance of this resolution the assignment in question was executed on the 15th August, 1884, and duly registered on the following day in the land registry office and in the office of the clerk of the County Court.

It purported to convey all the real estate of the debtors as set forth in the schedule annexed thereto, and also all their personal estate and effects and goods and chattels, which were not otherwise described than as follows:

"All and singular, the personal estate and effects, stock in trade, goods, chattels, rights and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects.

whatsoever and wheresoever, and whether upon the premises where said debtors' business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever."

The trusts of the deed were for the conversion of the property if required into money, payment of debts, and payment over of any surplus to the company.

The assignment was executed by the president and secretary of the company, by the trustees, and by a Mr. Wilson, a creditor. Mr. Wilson was also a director, and the president was one of the trustees and also a principal creditor of the company.

There was no evidence either way as to the execution of the deed having been authorized or not by the general body of the shareholders, and it did not appear that any of them had objected to or disapproved of it.

The seizure under the several writs of execution, as stated in the interpleader issue, took place on the 4th and 6th October, 1884.

The questions argued on the appeal were :

1. Whether the directors of an incorporated company had power and capacity without the special authority of the shareholders to authorize the execution of an assignment of all the company's estate in trust for payment of their debts.

2. Whether an assignment for the benefit of creditors was within the Act relating to mortgages and bills of sale of personal property: R. S. O. ch. 119.

3. If so, whether the description of the property assigned was sufficient to satisfy the requirements of sec. 23 of the Act, and if not, then

4. Whether as against the execution creditors the delivery and change of possession proved were sufficient.

I will pass over the first objection for the present, and deal with the second, which was not raised at the trial, and is taken for the first time in the reasons of appeal.

The appellants rely on the recent case of *Robertson v. Thomas*, 8 O. R. 20, in which it was held that an assignment in trust for creditors was not within the Chattel

Mortgage Act, and therefore that registration was not required, nor that the goods should be specifically described.

It is difficult to accept that decision as an entirely satisfactory one. None of the previous cases are discussed in the judgment, and the question is treated as one substantially bare of authority. Yet there is an unbroken series of decisions, not only under the former acts of 12 Vict. ch. 74, and 13 and 14 Vict. ch. 62, but also under the 20 Vict. ch. 3, the provisions of which, on this point, are now found in the R. S. O. ch. 119, holding that such assignments are within the act, and that unless accompanied by delivery and actual and continued change of possession, must comply with its requirements as to registration, description of property assigned, &c.

Of the earlier cases I may refer to *Taylor v. Whittemore*, 10 U. C. R. 440; *Heward v. Mitchell*, ib. 540, 11 U. C. R. 625; *Olmstead v. Smith*, 15 U. C. R. 426; *Harris v. Commercial Bank*, 16 U. C. R. 437. In the two latter cases a doubt was expressed by one of the members of the court whether such instruments ought to have been held to be within the act, but the question is treated as a settled one. Sir John Robinson, C.J., observing:

"A more comprehensive construction has, however, been given to them (that is to the words 'every sale of goods and chattels') by our courts, and they are held to comprehend assignments to trustees for the benefit of creditors."

In *Maulson v. Joseph*, 8 C. P. 15, shortly after the passage of the 20 Vict. ch. 3, the point was again raised, and it was expressly decided after a full argument in a court composed of the late Chief Justice Draper, Richards, J., and the present Chief Justice of this court, that a sale or assignment of chattels, though only in trust for the benefit of creditors, was within the act.

Arnold v. Robertson, 8 C. P. 147, is to the same effect, Draper, C. J., observing that the question is not open to argument.

These cases do not seem to have been cited to the court in *Robertson v. Thomas*, as I observe that Mr. Justice

O'Connor says that in all the cases he had looked at in which points had been decided respecting the description of goods, change of possession, &c., in such a manner as to lead to the belief that the courts treated assignments for the benefit of creditors properly so designated as within the meaning of the act, "the mortgagee or bargainee had an individual pecuniary interest either in his own right or as the agent of another in the transaction." But if anything could have been made of that distinction in *Maulson v. Joseph* and *Arnold v. Robertson* it would no doubt have been taken there, as the assignees were neither creditors nor agents of the assignor and had no interest other than as trustees under the assignment. Draper, C. J., pointed out that the bargainees would have no difficulty in such a case in making the affidavit required by the Act. *Perrin v. Davis*, 9 C. P. 147, appears to be a similar case.

The case of *Nolan v. Donnelly*, 4 O. R. 440 (1883) which I shall have to refer to again on another point, was tried before the same learned judge who tried *Robertson v. Thomas*, and the assignment for the benefit of creditors was held void as against execution creditors because the goods were insufficiently described. That decision was afterwards upheld in the Divisional Court by the learned Chief Justice who took part in the decision in *Robertson v. Thomas*, in the following year, and in thus deciding, it was necessarily held that the assignment was a bill of sale within the meaning, and subject to the provisions of the Act, as apart from the Act, the description was abundantly sufficient.

Whatever may be thought of the force of the arguments in favor of the view which was given effect to for the first time in *Robertson v. Thomas*, I do not think we are at liberty in the Court of Appeal to adopt that case as law and thereby to reverse a settled and uniform rule of construction and decision which has prevailed in all the courts, and has been well understood and acted upon by the profession for upwards of thirty years past.

I think we are the more especially required to uphold

it, as we know that notwithstanding the numerous amendments which have been made from time to time in the Chattel Mortgage Act, these assignments were not excluded from its operation until the Act of last Session, 48 Vict. chapter 26, (O) which in effect recognises the law as it had up to that time prevailed as laid down by the courts: *Barlow v. Teal*, 15 Q. B. D. 403, 405.

I think we must hold that the assignment is within the act, and therefore void unless its requirements have been complied with, or there has been a sufficient delivery and change of possession.

The learned Judge held at the trial, following the case of *Nolan v. Donnelly*, 4 O. R. 440, as being the latest decision on the point, that it was defective because the goods assigned by it were not sufficiently described; and no doubt if the description in that case was bad, *a fortiori*, it is so in this.

The description in each is almost *verbatim* the same up to a certain point, but in the former case it continues thus:

"Including among other things all the stock-in-trade, goods, and chattels, which they (the assignors) now have in their store and dwelling in the village of Renfrew aforesaid."

No language corresponding to this is found in the instrument before us, and for that reason I agree that the description is bad. An assignment of "all the goods of the grantor whatever and wheresoever," clearly will not do, and it is not made better or more precise by the addition of the words and *whether* on the premises where the debtors' business is carried on or *elsewhere*, for none of such goods are described as then actually being on such premises at the date of the assignment, and it is quite consistent with the terms used that there may have been none there at that time at all.

The only observation I desire to make upon the case of *Nolan v. Donnelly* is, that it does not appear to be consistent with a number of cases in which it has been held that a description of the goods, by reference to a specified locality is sufficient. That, as said by Hagarty, C. J., in *Mason v. Macdonald*, 25 C. P. 435 :

"Seems to be the general rule supported by the authorities. I think we must hold it to be the law of the court, that *without any mention of the place* where the goods actually are at the time of giving the mortgage, it is not sufficient unless they be described in such a manner that their identity may be ascertained with reasonable clearness."

The description, "stock-in-trade" without more, is no doubt a bad description, but when used in connection with a specified locality, as the store or warehouse or premises of the grantor in such a place, or street, it was never, that I am aware of, held to be insufficient until it was so held in *Nolan v. Donnelly*. Expressions of opinion in that direction are, no doubt, to be found in some cases, *e.g.*, per Draper, C. J., in *Hutcheson v. Roberts*, 7 C. P. 470 (and in *Kingston v. Chapman*, 9 C. P. 130, as to the insufficiency of a description by locality) but I think the same learned judge afterwards came to be of a different opinion on both points, and held that "stock-in-trade" would be sufficient when identified by a certain reference to the store or warehouse in which it was at the date of the instrument. I refer to the case of *Powell v. Bank of Upper Canada*, 11 C. P. 303, where in speaking of the judgment of the Court of Appeal in *Wilson v. Kerr*, which was delivered by him, he says:

"In *Wilson v. Kerr*, 17 U. C. R. 168, the description was, 'all and singular the stock-in-trade' of the assignor, 'situate on Ontario street, in the town of Stratford' * * * The court held this to be an insufficient description, and the decision was affirmed in the Court of Appeal, 18 U. C. R. 470, where it was held that there being no list or schedule of the stock-in-trade, the premises where it was to be found should be designated with greater certainty."

I refer also to *Ross v. Conger*, 14 U. C. R. 525; *Harris v. Commercial Bank*, 16 U. C. R. 437; *Howell v. McFarlane*, 16 U. C. R. 469; *Rose v. Scott*, *Ib.* 385; *Maulson v. Joseph*, 8 C. P. 15; *Mason v. McDonald*, 25 C. P. 435; *Bertram v. Purdy*, 27 C. P. 271; *Holt v. Carmichael*, 2 A. R. 639; *Re Thirkell*, 21 Gr. 492; *Paterson v. Maughan* 39 U. C. R. 371.

No doubt the decisions as to what is a full and sufficient description, and within the meaning of the Acts have been far from uniform, and it has always been felt to be difficult, if not impossible, to lay down any general rule on the subject which would exclude evidence extraneous to the description used in the instrument for the purpose of identifying the property assigned.

During the argument it was said, that the Supreme Court of Canada was supposed to have recently decided, in a case of *McCall v. Woolf* an appeal from the Q. B. of Manitoba, that a description of goods by locality merely was insufficient under the Chattel Mortgage Act, in force in that Province (Rev. Stat. Man., ch. 49) sec. 5 of which is verbally identical with sec. 23 of our own act, R. S. O., ch. 119. The case has not yet been reported or noted, but by the courtesy of the registrar of the Supreme Court we have seen a copy of the judgment.

It is, however, very much the reverse of what it was supposed to be, and as I read it entirely accords with the view expressed by Draper, C. J., in the passage above quoted from *Powell v. Bank of Upper Canada*, 11 U. C. R. 303.

I make the following extract from the judgment of Sir W. J. Ritchie, C. J. He says the description

"Need not be such a description as that with the deed in hand without other inquiry the property could be identified, but there must in my opinion be such material on the face of the mortgage as would indicate how the property may be identified if proper inquiries are instituted, as for instance all the property in a certain shop."

On this point there was no difference of opinion in the court. Mr Justice Henry says :

"I think the statute would be sufficiently satisfied by a general description, such as 'all the goods in a certain store,' properly locating it, and a detailed description of them is in such a case altogether unnecessary, because, the particular store being ascertained, the description covers all the goods with as much certainty as if each article were specified and described." The court, however, came to the conclusion that the

description was insufficient because, though it might have been "the intention to convey all the goods in the store, the mortgage did not say so, nor was there *any evidence to shew* that the goods named in the schedule annexed to it were the only goods of that description in the store, or what were the exact goods in the store."

Mr. Justice Strong and Mr. Justice Henry dissented, being of opinion that the description was sufficient to pass the goods in the store.

The decision does not assist the plaintiffs, there being, as I have said, nothing in the description of the goods, by locality or otherwise, by which they can be identified, and therefore the title of the assignees fails unless a sufficient delivery and change of possession has been made out.

At the trial the case would seem to have turned upon the question whether the plaintiffs had taken immediate possession, and the learned judge found as a fact that they had not done so. When the assignment was made, the intention of the directors was to procure from the creditors of the company a deed of composition and discharge. It was supposed that this could be obtained in a very short time without difficulty, and that the business of the company would not be interrupted. I quote from the judgment of the learned judge on this point. He says :

"It is quite plain from the evidence that this deed was contemplated at the time the assignment was made. For a long time after the assignment there was no visible change in the possession of the property, and the correspondence seems to shew that the business was conducted on behalf of the company and not on behalf of or by the trustees. I think from the evidence that such was really a fact, and I think from all the evidence that the witness Hale who had been the manager of the company from the beginning was not far mistaken in his understanding of the matter. In his evidence he says : 'As I understood it, the property was to be considered to belong to the trustees to prevent any of the creditors getting a preference until it was seen whether or not the composition deed would go through.' He also says : 'I understood that the estate had been assigned to the trustees. I was then employed by the trustees. I remained there on the idea that the composition deed would be matured, and that the company would go on.'"

Then he says :

"I think the proper conclusion from the evidence is that the company did not quit and deliver up possession to the trustees upon the execution of the assignment, but they, the company, continued in possession long after the assignment."

I do not see my way to hold that the inference of fact thus drawn by the learned Judge is wrong, but I do not think it disposes of the case. Even if the trustees did not take possession for a week or ten days after the assignment, pending the abortive attempt to procure a deed of composition and discharge, I think the evidence makes it very plain that about the 28th of August they did take charge of the property, assumed its management in all respects, and thenceforward continued in actual possession.

I refer to the joint letter of the trustees Cockshutt and Champion, to their co-trustee Whiting, which the latter accepted and acted on, and to the evidence of Hale, the former manager.

Q.—I am told that the trustees came there pretty frequently and asked you questions? A.—After the first week or ten days they came there quite often.

Q.—Is there any doubt that after the first few days you were managing it for them? A.—Well, I suppose not, sir.

Q.—And you continued to manage for them until the sale, did you not? A.—Yes.

Q.—Then, is there any doubt about their having been in possession? A.—They did not give me any permanent or full instructions until the time I have testified to.

Q.—They thought you were a friend of theirs? A.—I don't think they had any friendly feeling to me.

Q.—They continued then in charge, at any rate having the oversight and control, if they liked, up to the time of the sale? A.—Yes.

Q.—Did the company, by its officers, in any way interfere with you? A.—No.

Buchanan, the former secretary of the company, was dismissed by the trustees about the 17th September. He was asked :

"Q.—Who dismissed you? A.—James G. Cockshutt was the first man that said anything about it.

"Q.—You were dismissed by the trustees, were you not? A.—Yes.

"Q.—Did you accept the dismissal? A.—I did."

It thus appears that long before the seizure under the defendants' executions the plaintiffs had taken, and they then were in, actual possession of the goods. There is no doubt, too, that this was done with the assent of the directors.

The case of *Parkes v. St. George*, 10 A. R. 496, had been decided shortly before the trial of this case, but it was not then reported and was not cited to my brother Ferguson (nor, indeed, to us on the argument of the appeal), but it appears to me to shew that the possession of the trustees prevails over the executions, having been taken before the creditors were in a position to seize the property assigned. See *Scribner v. Kinloch*, 12 A. R. 372.

In my opinion the appeal should be allowed on this ground unless the first objection above stated holds good, namely, that it is *ultra vires* the directors of an incorporated trading company to make a general assignment of its assets for the benefit of its creditors in the absence of an express authority conferred upon them by the shareholders for that purpose.

Assuming for the moment what I by no means admit, that such an instrument is *ultra vires* the directors, it is nevertheless clear that it is not *ultra vires* the company, and that the shareholders might authorize the directors to execute it.

There being in the present case no evidence whether they did so or not, the argument for the defendants must be pushed to the extent that in the absence of proof of prior authority or subsequent ratification the assignment, though in all respects regular on its face, is absolutely void as against a creditor—a stranger to the company—so that no title whatever passed by it to the trustees. In other words, the execution creditors contend that it rests upon the latter to prove as against them that the consent or authority of the shareholders was duly given.

In this contention I am unable to agree. The deed is *prima facie*, properly executed, purporting to be the deed of the company, and for a purpose not expressly or im-

pliedly forbidden by the general act, that is to say it is a deed *intra vires* the company. That being so, and as the will of the company can only be carried out through the medium of the directors, I think that the onus of proving the invalidity of a deed by which it appears to be regularly expressed rests *in omnibus* upon those who attack it.

In *Shrewsbury and Birmingham R. W. Co. v. North-Western, &c., R. W. Co.*, 6 H. L. Cas. at p. 135, Lord Cranworth says:

"I agree that *primâ facie* corporate bodies are bound by all contracts under their common seal. When the legislature constitutes a corporation it gives to that body *primâ facie* an absolute right of contracting. But this *primâ facie* right does not exist in any case where the contract is one which, from the nature and object of corporation, the corporate body is expressly or impliedly prohibited from making; such a contract is said to be *ultra vires*, and the question is, whether there is anything on the face of the act of incorporation which expressly or impliedly forbids the making of the contract sought to be enforced."

In the *South Yorkshire R. W. Co. v. The Northern R. W. Co.*, 9 Ex. 55, affirmed in error, ib. 642, we find Mr. Baron Parke's well known statement of the rule:

"Where a corporation is created by act of Parliament for particular purposes with special powers, their deed though under their corporate seal, does not bind them *if it appears* by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments that the deed is *ultra vires*, that is, that the legislature meant that such a deed should not be made."

These cases are cited by Moss, J. A., in *Bickford v. Grand Junction R. W. Co.*, 23 Gr. 302, 347. See also the same case in the Supreme Court, 1 S. C. R. 696, 730, per Strong, J.

L'Arcy v. The Tamar, &c. R. W. Co., L. R. 2 Ex. 158, was an action upon a bond purporting to have been made by the defendants. There the question was, whether it had been executed under proper authority. Bramwell, B., said,

"It is not to be presumed that what has been done is *ultra vires*, and therefore when an instrument is produced under the seal of the company it is *primâ facie* to be taken that

the seal was properly affixed." Channell, B., remarked: "On the production of the bond under the corporate seal, it is *primâ facie* to be presumed that it is valid."

I am therefore of opinion that in the absence of evidence that the directors were not duly authorized to execute this assignment, the defendants have not successfully impeached it.

I think the evidence ought to be considered with some strictness against the respondents on this point; because, even if the fact be that there was no prior resolution or consent of the shareholders to the execution of the deed, there is evidence from which it appears highly probable that, if the question had been raised at the trial, the case might have been brought, as regards acquiescence or assent on the part of the shareholders, within the authority of *The Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43.

Here the shareholders were few in number. They appear to have been resident in, or in the vicinity of Brantford—actual notice and assent is shewn as to many of them—the assignment and proceedings under it were, as one witness said, notorious—the intended sale of the property by the trustees was advertized for weeks before it took place—and to use the language of Willes, J., in the case last referred to, there is no suggestion that any of the shareholders objected to what was done, the transaction was not in any way concealed and no shareholder was called at the trial to say that he did not know of it.

But further, I am of opinion that these defendants, as strangers to the company cannot object that the authority of the shareholders was not given or that they have not ratified the deed. In *McCormack v. Parry*, 7 Ex. 355, the question was raised by an execution creditor, the contention being that the instrument attacked was *ultra vires* the company as being contrary to the express terms of the statute.

But here if no shareholder has been found to object to what has been done, on what principle can it lie in the mouth of an execution creditor to do so? If the share-

holders might have authorized the deed, whose interests but theirs are affected by the absence of such authority?

What is said by Willes, J., in *Taylor v. The Chichester, &c. R. W. Co.*, L. R. 2 Ex. 356, 390, is very much to the point: "I entirely agree with my brother Blackburn, that if there be anything contrary to the duty of the directors in having put the corporate seal to the contract in this case it amounts to a breach of trust only, and a breach of trust in respect of matters which may affect the shareholders only."

I refer also to the language of Blackburn, J., at page 380, and to *Greenstreet v. Paris*, 21 Gr. 234; *Bank of Toronto v. Cobourg R. W. Co.*, 10 O. R. 376.

The only question which remains to be considered is whether, even if there was no resolution or assent of the shareholders, it can be said that the directors, in executing this assignment exceeded their powers?

The act is not one which changes the character and extent, or the purpose and object of the company. It involves no changes in the membership or the amount of the capital stock or the liability of the shareholders.

Many cases are to be found in which attempts to create fundamental changes of that kind have been called in question as *ultra vires* the directors or the whole body of shareholders: *Ashbury v. Riche*, L. R. 7 H. L. 653, but this in its nature differs from them all.

In *Donly v. Holmwood*, 4 A. R. 555, it was held, affirming the judgment of the Common Pleas, 30 C. P. 240, that directors of a Joint Stock Company incorporated under the former Joint Stock Companies' Letters Patent Act of 1869, and subject to the Insolvent Act of 1875, could not, without being authorized by the shareholders, make a voluntary assignment in insolvency under that Act. The action was brought by the plaintiff as the assignee so appointed to recover an amount due by a shareholder for calls upon shares held by him in the company. The immediate effect and necessary consequence of such an assignment, if valid, would be to change the legal status of the company: to transfer the right to administer its affairs in

making calls upon shares, suing for and collecting its debts, &c., to an official assignee, and to wind it up or place in liquidation.

This, I think, was the *ratio decidendi* both in this court and in the Court of Common Pleas.

The latter court expressed themselves of opinion that the power to make an assignment for the benefit of creditors was to be looked upon as something very different from a power to execute an assignment under the Insolvent Act.

The case of *The Quebec Agricultural Implement Co. v. Hebert*, 1 Quebec L. R. 363 (1874), was cited on the argument. In that case it was held that the shareholders could not administer the affairs and franchises of the company otherwise than through the medium of the directors. The directors had resigned, and the shareholders appointed a person as assignee to be assisted by a council of advisers composed of three of the late directors, with full power to *wind up* the affairs. The person so appointed proceeded, in the company's name, to call in and sue for the amount of a share subscribed by the defendant. It was held that the action would not lie.

I do not see that the case has any application, unless it be contended under it that even the shareholders could not authorize or ratify an assignment of the company's assets in trust for the benefit of their creditors.

In *Morawetz on Corporations*, S. 240, the distinction is pointed out between the power of directors to wind up or dissolve the company and their power to adopt such reasonable means as they think proper for the payment of the company's debts.

The former cannot be done without the assent of the shareholders. But as to the latter,

"It is the duty of the directors of a corporation to pay its debts, and they may apply all of the corporate assets to this end, although the corporation may thus be disabled from carrying on its business. It has been held that directors of an insolvent corporation may convey the whole of its assets

to a trustee for the payment of creditors." See also sections 164, 239, 578, 579, and 580. *Dana v. U. S. Bank*, 5 *Watts & Serg.* 223; *Whitewater Valley Company v Vallette*, 21 *How.* 414; *Abbott v. The American Rubber Company*, 33 *Barb.* 579, 584, and *Sergeant v. Webster*, 13 *Met.* 497, may be referred to.

In the judgment in the latter case, delivered by Shaw, C. J., it was held that under the general power to administer in all things the affairs of the company, the directors had authority to convey all the company's property in trust to pay or provide for the payment of its debts.

In the State of New York the assent of a certain proportion of the corporators is, by statute, made necessary in the case of some companies to assignments of this kind, but the general course of decision appears to be that it is within the power of the directors to make them.

In *Wilson v. Miers*, 10 C. B. N. S. 348, the general powers which the directors of a company had to sell ships, and which was held to authorize a sale by them of all the vessels the company possessed, was distinguished from a power to wind up the company, which could only be done by authority of the shareholders.

In the case at bar, if the directors might have conveyed part of the company's property to pay, or in trust for payment of its debts, it is difficult to resist the conclusion, that as a matter relating to the administration of its affairs they have power to deal in the same way with the whole, if it becomes necessary to do so for the same purpose.

The company was a private commercial corporation having no public duties to perform, for the proper discharge of which it was necessary that they should retain all or any part of their corporate property. From that point of view, the assets being all liable to be swept away by an execution creditor, no reason exists, that I can perceive, for holding that the directors, who have full power in all things to administer the affairs of the company, have not, in the exercise of such power, when the emergency

calls for it, the right to deal with the corporate property in such manner as in their judgment appears best calculated to promote the company's interest in paying the creditors, and preventing a sacrifice of the assets. If that can best be done by placing them in the hands of trustees for the benefit of the company's creditors, I consider that it may fairly be described as an act done in the administration of the company's affairs. If it is not a winding up proceeding (an act, which I concede, is not within the scope of the powers of the directors), and is not obnoxious to the objections I have already alluded to, can it be described otherwise than as an act of management or administration? If that is essentially its character, as I think it is, it is *intra vires* the directors.

It may be said that the effect of making a general assignment is to place it in the power of a creditor of the company to wind it up under the Winding-up Act of 1882, 45 Vict. ch. 23, (D) which provides (sec. 9) that a company shall be deemed insolvent if *inter alia*, it has made any general conveyance or assignment of its property for the benefit of its creditors, or if being unable to meet its liabilities in full it makes any sale or conveyance of the whole or the main part of its stock or assets, *without the consent of its creditors*, or without satisfying their claims.

If the words "without the consent of its creditors" govern the whole clause, the objection has no force, because the assignment in question was in fact executed in pursuance of a resolution passed at a meeting of the creditors of the company held on the 13th of August.

But even if they do not, I am of opinion that such an assignment is not necessarily *ultra vires* the directors merely because it exposes the company to a winding up, inasmuch as other acts and omissions mentioned in section 9, which may clearly be those of the directors, *e. g.*, calling a meeting of creditors for the purpose of compounding with them, exhibiting a statement of the company's affairs shewing its inability to meet its liabilities, &c., will have the same effect.

It appears to me that this assignment is a valid instrument, and is not within the decision in *Donly v. Holmwood*. Therefore while not dissenting from any opinion expressed by my brother Ferguson upon the case as it was presented to and dealt with by him, I think the appeal should be allowed, for the reasons above given.

BURTON, J. A.—Unless we are prepared to overrule the decision of this Court in *Donly v. Holmwood*, 4 A. R. 555, it appears to me to be so clear that the directors of this company, said in the reasons against appeal to have been incorporated under the Joint Stock Companies' Act of 1869 (32 and 33 Vict. ch. 13 D.), but in fact I suppose under the act of 1877, had no power without the special authority of the stockholders to make the assignment for the benefit of creditors, which is relied on by the claimants, that it does not become necessary in my opinion to refer to the other grounds upon which the learned judge below based his decision.

The case should not be embarrassed with the question of *ultra vires* as we usually understand that term, but the question is rather what is the exact nature and extent of the authority possessed by the governing body.

In the first place we must remember that they are the agents of the corporation only to the extent and subject to the restrictions and regulations to be found in the Act of Parliament under which the company are incorporated, or as expressed by *Bovill*, *arguendo* in *Hambro v. Hull*, 3 H. & N. 789: "The company differs from a private partnership in this respect that the directors are not persons having a general authority as partners but having certain powers which are defined by a deed of settlement to which the public have access." Or as it is elsewhere expressed: "Officers of a corporation are special and not general agents, consequently they have no power to bind the corporation except within the limits prescribed by their charter." See *Agar v. Athencæum Life Assurance Co.*, 3 C. B. N. S. 725; *Athencæum Life Assurance Co. v. Pooley*, 3 DeG. & J. 294; *Adriance v. Roome*, 52 Barb. 399.

The Act of Parliament clearly defines their powers: so long as the act done is within those powers the person dealing with them has a right to assume that as against the company all matters of internal management have been duly arranged: was then an assignment of this kind within the scope of their authority, and upon this point I think we are concluded by the judgment of this court in the cases to which I have referred, under an Act of Parliament, the language of which, so far as it relates to the powers of the directors, is identical with that which was the subject for decision in that case. It was there held that the powers which were delegated by the act to the directors "were confined to transactions in the course of conducting the business for which the company had been formed, and did not extend to that which was in effect a destruction of the being of the company; that they were appointed to manage the business of the company and not to take a step which virtually terminated its existence."

I quite agree in that view. In fact the judgment was an affirmation of my own view of the case at *nisi prius*, but even if I doubted its correctness it is binding upon us until reversed by some higher authority.

It is true that the act in question in that case was the execution of an assignment under the Insolvent Act, but that does not in my opinion affect the principle of the decision. This court held that neither under the charter of the company, nor under the Insolvent Act, was any power conferred upon the directors to execute an assignment of the company's property for such a purpose. It seems almost to have been assumed, that the company itself could have complied with the demand made upon them and have executed an assignment in terms of the statute. If the court had considered it *ultra vires* of the company, it would not have been necessary for the late learned Chief Justice, in the course of his very able judgment, to have dwelt as he did upon the absence of power in the directors to make it "without the authority of the shareholders being obtained." All that it would have been

necessary to say would have been, this is an act which the company itself could not have done, and the directors, therefore, could not do what the company itself had no power to do. And in referring to the case in 5 L. J., N. S., and the judgment of Willes, J., he adds: "Other passages occur in the judgment which indicate the necessity of taking the opinion of the shareholders before such an irrevocable step is taken."

It will, I venture to say, startle the commercial community in this Province who have invested their means largely in Joint Stock Companies to hear that a body of directors to whom they have entrusted the management of their interests in the company as a going concern, are held entitled without consultation with their constituents to make a general assignment of their effects, owing it may be to some temporary pressure, which might, if the shareholders had been applied to, have been easily surmounted without resort to a step so fatal to the continuance of the company.

It is clear that the authority of the directors is restricted to the powers defined in the Act of Parliament; can it be supposed that if a merchant contemplating a short absence had given a power of attorney couched in similar language to that used in this Act to an agent for the management of his business in his absence, such agent could have made a general assignment of his principal's effects for the benefit of creditors? It may be so, but men of business in that case had better be very cautious in giving powers of attorney.

I am quite sure that in deciding *Donly's Case* originally, I should have hesitated before arriving at the conclusion I did if it had been shewn that the directors had been specially authorised to execute the deed, and I am quite sure that the learned Chief Justice would not have entered so fully as he did into the question of the powers of the directors if he had been satisfied that the deed was *ultra vires* of the company itself.

In my humble judgment it is purely and simply a ques—

tion whether the execution of this deed by the directors which transferred the discretion which the shareholders had vested in them to strangers was within the limits of the authority really conferred upon them, if it is, we should have to say whether the company itself could execute such an assignment—if it is not within those powers the property cannot be held to have passed, because they have affixed the company's seal to the deed, it being shewn to have been affixed without legal authority.

In every case the agent has a delegated authority, and can therefore have no more than is delegated. Underlying the whole subject there is this fundamental proposition that a principal is bound only by the authorised acts of his agent.

It is, of course, undisputed that whatever is beyond the power of the corporation, is *a fortiori*, beyond that of the directors, but the converse of this is not true.

The directors have no powers which are expressly or impliedly denied them by the charter or deed of settlement. They have none which are not requisite for carrying on the business and objects of the company and the attainment of the corporate ends. They have none which are not required to enable them properly to accomplish their own duties, and in the discharge thereof to carry on successfully the affairs of their constituents: See *Brice* on *ultra vires*, p. 599.

The case of *Wilson v. Miers*, in 10 C. B. N. S. 348, is an illustration of the liberal construction to be placed upon the words creating the power when the act comes *prima facie* within the powers of management; there, however, in addition to the very wide powers of the deed of settlement, a resolution had been passed at a general meeting of shareholders to sell the vessels and realise the property of the company, and the question was as between them and a purchaser whether the sale of all the vessels was not good; but the remarks in the same case bearing upon the winding up of the company, and the distinction which the court drew between an act of this kind, a sale

in the company's interest under the general authority given, and an attempt to wind up the company which would have been beyond their powers, have an important bearing.

Since the decision of *Donly v. Holmwood*, an act has been passed for winding up joint stock companies, 45 Vict. ch. 23, (D.) which does not, however, affect the case.

That act would seem to contemplate the right of an incorporated company to make a general assignment for the benefit of creditors, subject only to its being treated as an act of insolvency, a point upon which I must confess I never entertained much doubt, and for which I think there is express authority in *Lord v. The Copper Mining Co.* in 2 Ph. 740. But the right of the directors to do so of their own mere motion stands upon a very different footing, and would be if in excess of their authority, absolutely void, unless it is capable of being and until it be sanctioned by the company: *Royal British Bank v. Turquand*, 6 Ell. & B. 327; *London Dock Co. v. Sinnott*, 8 Ell. & Bl. 374.

It is not pretended in this case that there has been any ratification of the act of the directors, and when the sheriff went to seize, the property still remained in the company.

I am not, as I have already remarked, overlooking the fact that the assignment in *Donly v. Holmwood* was an assignment under the Insolvent Act, but it does not to my mind affect the principle of the decision. The effect of each assignment is the same; viz., to vest the property and assets of the assignor in the person to whom the assignment is made.

In neither case is the franchise affected except at the instance of the Crown. In *Donly v. Holmwood*, an action had been brought before the assignment for calls previously made and overdue, and the assignee's name was substituted for that of the company to enable him to collect this debt as an asset of the company and there was no difference between that suit and any other action for the recovery of any property assigned.

It is not necessary for the purpose of this case to consider whether this was an act which could be done by the authority of the majority only, or required the consent of every shareholder. I refer to it because a very eminent jurist, Mr Justice Story, questioned the right even of the company to do so without such consent.

In *Beatson v. the Farmers' Bank of Delaware*, 12 Peters, at p. 137, he says : " But I must say that, independent of some special and positive law or provision in its charter to such an effect, I do exceedingly doubt if any corporation can, at least without the express consent of all the corporators, rightfully dispose of all its property by such a general assignment, so as to render itself incapable in future of performing any of its corporate functions."

That opinion was based probably upon the analogy between such a corporation and an ordinary partnership in which, although the agency of each partner is of a much more general character than that of a director, and although each partner may dispose of the partnership property, and pledge it or transfer it for the payment of the partnership debts, still it has been repeatedly held that one partner has no authority without the express consent of his co-partners to make a general assignment for the benefit of creditors. It was so decided by Draper, C. J., giving the judgment of the Court of Common Pleas in *Cameron v. Stevenson*, 12 C. P. 390.

Best, J., in *Barton v. Williams*, 5 B. & Ald. 395, in speaking of such an assignment by one of several partners, says : " I consider that neither during the existence, nor after the dissolution of a partnership can such a transfer be made because of want of power of any one partner to make it, a direct payment of money or a transfer of property to an acknowledged creditor is an admitted and a necessary power during the existence of the partnership. * * But on an assignment of the property of the firm to a trustee a complication of duties and responsibilities is involved. An agent is appointed to control and dispose of the whole; the capacity, integrity and industry of another

are brought to the management, and the fitness of the party selected is judged of solely by one member of the firm. From what part or principle of the partnership relation can such an authority emanate"? And the language of Lord Hatherley in *Fraser v. Kershaw* is much to the same effect. Speaking of the right of the solvent partner he says, 2 Jur. 880: he has a right to sell the partnership assets to pay partnership debts, but it does not follow that he can transfer that property to a third party; it is a personal authority belonging to him, qua partner, and to be exercised for partnership purposes.

I cite these passages to shew that there is much force in the view suggested by Mr. Justice Story that the assent of all corporators might be necessary, but chiefly as supporting the argument of the late Chief Justice Moss, following that of the Court of Common Pleas, that the powers of the directors are defined, and do not expressly extend to an act of this kind, and the purposes of the business of a joint stock company, which is only a large partnership equally with those of an ordinary partnership, do not require that such a power should be implied.

I do not doubt that authorities may be found in the United States for such a position, but I think those pro and con when marshalled will be found to be very equally divided; but some of the cases are no authority for the position for which they have been cited.

Dana v. The Bank of United States 5 Watts & Serg. 223, decides nothing more than this, that the directors of the bank had the power to transfer a portion of its assets for the purpose of securing certain named creditors. It is true a reference is made in the judgment to certain other cases in which some judges had intimated their opinions that they had the power to make a general assignment for the benefit of creditors, but this case itself decides nothing more than what I freely admit to be the law, the power of the agents of the company authorised to manage its business, to give security upon a portion of its assets.

White-water Valley v. Vallette, 21 How. 474, certainly

does not give any sanction to the view that the directors without the express authority of the shareholders could make a general assignment. There is a dictum that the corporation could make a general assignment for the benefit of creditors, a point which can admit of no dispute if made with the consent of all the corporators, and possibly with the consent of a majority duly ascertained. I say a dictum, because the point really decided was that the corporation having power to borrow money had power to mortgage.

Reference has been made to a judgment of Shaw, C.J., in *Sargeant v. Webster*, 13 Met. 503, but, however much we may respect the opinion of that distinguished jurist, a perusal of the judgment will convince any one how unsafe it would be to rely upon decisions of the United States courts in matters which we are bound to decide under the law of England. When I mention that the effect of the decision there was to hold that an assignment of the property and effects of a corporation made by the treasurer of the company upon a vote of the directors, in his own name, and made under his own seal, was sufficient to pass the property and prevent its being taken in execution, I need scarcely say it can hardly be regarded here as of much weight on such a point; but in truth the assignment there was in effect a mortgage to secure a particular creditor, and the principal question was as to its being a fraudulent preference, and it is no authority beyond the mere dictum of the judge that the directors could make a general assignment.

My view of this case may be summed up in a very few words. In the case of an ordinary partnership if any act is done by one partner on behalf of the firm, and it is necessary for carrying on the partnership business in the ordinary way, the act will be binding on the other partners even though it included a pledge of the partnership effects, or a transfer of them, or part of them, in payment of debts. But if an act is done by one partner on behalf of the firm, and it cannot be said to be necessary

for carrying on of the partnership business in the ordinary way, it will not be binding on the partners, and a general assignment for the benefit of creditors is such an act. Although each partner has by the law the fullest authority to act as agent for the others in the transaction of the business of the firm in the ordinary way, or in the words of this Act of Parliament, "full power to administer the affairs of the company," for that is precisely the power which each partner (notwithstanding any restriction or limitation in the partnership articles) is, as to third parties not cognizant of these restrictions, assumed to possess, the execution of such an assignment does not come within the authority.

No joint stock company could practically be carried on if all the shareholders were agents of each other so as to bind the whole, so that this power is in practice entrusted to a few who are called the directors, but they are merely large partnerships, and when the statute incorporating them does not expressly or impliedly vary the principles to be applied, those principles which apply to an ordinary partnership are applicable to a company. The words that I have quoted confer in my opinion precisely the same powers and no other which a partner would possess, including I do not for a moment question, the right to pledge the partnership assets and to apply them to the payment of debts, precisely as a partner can do so, though probably they would have no power to pledge the property for money borrowed as the assent of the shareholders is by sec. 85, made necessary, but the same principle which the courts have adopted as to executing a trust deed, for the distribution of the company's assets among its creditors, applies with equal if not greater force to such a deed by a board of directors with no greater powers than those here given.

As to what would be essential to a ratification, I may refer to Lord Eldon's words shewing that anything short of a ratification at a public meeting duly convened, or that of every shareholder, would be futile.

"That is the act of all," he says, "which is the act of the

majority, providing all are consulted and the majority acting bonâ fide, after due consideration think proper to adopt it."

It was conceded upon the argument that there had been no meeting of the shareholders to sanction or ratify the act of the directors, and it is scarcely necessary to say that the onus of establishing such a sanction or ratification was upon the parties setting up the deed, and not upon the execution creditors who assert that the deed established in evidence was not sufficient to pass the property.

There is, of course, an obvious distinction between this case and such cases as *Taylor v. Chichester*, in which Lord Blackburn made the remarks quoted by the Chief Justice, in which I fully concur. He there points out that any shareholder has a right to object to anything being done by the directors which is in contravention of the rights secured to him by the charter; but if he chooses to assent or lie by when he might have protested he cannot afterwards be heard in a court of justice to impeach the transaction, and if it be a matter within the general apparent authority of the directors a stranger, and even the company itself, could not raise the objection if the shareholders did not choose to raise it. That appears to me to be sound sense and sound law.

The distinction, as I have already observed, is obvious; if the making of the assignment was within the powers of the directors, under the words defining their powers *cadit quæstio*; if it was not when the executions were placed in the hands of the sheriff, they bound the property simply because there had been no valid transfer from the company.

It is a mistake to suppose that because they could not make the assignment they could not have sold the property and with the proceeds have paid the debts; they are entrusted with that power and to exercise their discretion as to the mode and time of sale, but they have no power, according to the cases to which I have referred, to transfer that discretion to another without the shareholders being consulted.

Being unable, therefore, to distinguish this case from

that in which the late Chief Justice Moss delivered the able and well considered judgment to which I have referred, which was apparently concurred in by the other members of the Court, and which appears to me to be in accordance with the principles applicable to partnerships incorporated or unincorporated, and the reasoning to be found in the English cases I am forced to hold that the case is concluded by authority.

It may be, although we have no evidence as to the facts, that a majority in amount at all events, of the shareholders were assenting to the transfer, and I think it by no means improbable that if a meeting of the shareholders had been called the assent of all might have been obtained, although there is always a possibility when matters of this kind are discussed at a public meeting that the majority may be induced to change their views. This is, however, a general question, the vital importance of which as affecting the rights of shareholders in joint stock companies cannot be overrated, and it would, in my opinion, be a very dangerous principle to lay down, that under such authority as these directors possessed they could make a general assignment of the company's property even if I were at liberty in the face of the decision in *Donly v. Holmwood*, to act upon my own opinion.

I think the appeal should be dismissed.

Appeal allowed, with costs. [BURTON, J.A., dissenting.]

DAINTY V. VIDAL.

Agreement to surrender lease—Delivery of possession—Time not of the essence of the contract.

The plaintiff was lessee of certain premises, the lease having nearly a year to run, when he was on or about the 13th of January applied to on behalf of the defendant, the executor of the lessor, to surrender the remainder of his term, which he consented to do in consideration of \$250, agreeing to give up possession on the 1st of February. In consequence of negotiations between the parties interested, the plaintiff did not actually give up possession until the end of February, he agreeing to deduct a month's rent as reserved in the lease. Possession was accepted by the defendant's agent, but the defendant refused to pay the consideration agreed upon, alleging as a principal ground for such refusal the non-delivery of possession on the day named.

Held, that time was not by the agreement made of the essence of the contract, and the delay formed no defence to an action for the sum agreed to be paid.

THIS was an action instituted in the County Court of Lambton, by William H. Dainty against The Hon. Alexander Vidal, executor of Christina Colina Cameron deceased to recover \$220.83 with interest from 1st March 1885.

It appeared that plaintiff was lessee of certain premises in the town of Sarnia for seven years from 1st November, 1879, under a lease executed by the testatrix to plaintiff; which premises plaintiff had taken possession of and paid the rent thereof up to 1st of February, 1885, prior to which the testatrix had died; that the leasehold premises having been sold by the defendant to the Lambton Loan Company, the defendant by an agreement in writing dated 14th January, 1885, and executed by the plaintiff and defendant, agreed to pay plaintiff the sum of \$250 for the surrender of the lease and delivery up of possession by plaintiff to defendant on or before the 1st February following; and in the event of failure to give up possession at the time appointed plaintiff might be proceeded against as an overholding tenant without color of right. It further appeared that after execution of that agreement, and before the 1st of February, the plaintiff proposed to the defendant and the Loan Company to retain possession of the premises until the end of that month at the same

rate of rent, to which the defendant answered that personally he had no objection, but that he had no power to extend the time for giving up possession, and that Mr. Gurd on behalf of the company said he had no power to give an extension, but that "if the title was completed before the period of his going out had expired the company would not hurry him."

The plaintiff accordingly remained in possession until the 28th of February when he gave up possession, but the defendant refused to pay the \$250 less one month's rent (\$29.17)—leaving a balance of \$220.83 which plaintiff claimed with interest thereon.

The action came on for trial before C. Robinson, County Judge, on the 29th July, 1885, who at the close of the argument directed a nonsuit to be entered; from which judgment the plaintiff appealed and the appeal came on to be heard before this Court on the 11th March 1886.*

Lash, Q. C., for the appellant. The sum agreed to be paid by the defendant was the consideration for the surrender of the term. As to possession, if that was not given up as agreed upon, the memorandum signed by the parties expressly stipulates for a remedy by treating plaintiff as an overholding tenant. Here, however, possession has actually been given and accepted by the parties interested, so that defendant would seek to avail himself of the benefit without paying the stipulated price—and no mention is made in the agreement of any forfeiture of the consideration money if possession were not given up punctually on the day named, and no attempt has been made to shew that any damage had arisen to defendant, or the estate he represents, by reason of the delay in giving possession. In reality plaintiff acted on what might be considered the acquiescence of the parties interested and remained in possession, and for such continued occupation plaintiff has allowed rent at the same rate as that reserved in the lease.

J. MacLennan, Q. C. for the respondent. The judgment

*Present, HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

of the Court below is right. In construing this agreement it is necessary to look at the position of the parties and the circumstances which gave occasion for its being entered into. The evidence shews that Mr. Cameron was acting for the estate and had entered into an agreement with the loan company for the sale to them of this property; Dainty holding a lease of the premises which then had nearly a year to run. But the company refused to carry out the purchase subject to Dainty's lease, and therefore Cameron urged Mr. Vidal to procure at any reasonable price a surrender of the term.

Time therefore was a most material consideration in the matter, and though not expressly stated in the agreement to be so, was decidedly of the essence of the contract.

Ball v. The Canada Company 24 Gr. 281; *Webb v. Hughes*, L. R. 10 Eq. 281; *Tilley v. Thomas* L. R. 3 Ch. 61; *Great Northern R. W. Co. v. Harrison*, 12 C. B. 576. Sugden's V. and P. 14 ed. 257, 259, 268, were referred to.

April 20, 1886. HAGARTY, C. J. O.—On the evidence as reported to us I do not see how the nonsuit can be supported.

The agreement under seal states the plaintiff to be tenant to the defendant, and an agreement to surrender to him at a future day, in consideration of \$250, to be paid by Vidal to him immediately that full possession is given to Vidal or his agent or assigns. Dainty then agrees to surrender the lease and give possession on the 1st February then next, and to pay rent as in the lease provided until possession is given by him; and he further agrees that if possession is not given up on 1st February, he may be proceeded against as an overholding tenant, without color of right.

The lease from Miss Cameron to Dainty is annexed to this agreement. Vidal is her executor. At the trial Dainty swore that about the middle of January he asked

Vidal's permission to retain possession another month, and Vidal said he had no power to grant this, but, as far as he was concerned he had no objection. Dainty says: "I gave up possession according to agreement, not on the day" (*i. e.*, 1st February.) He does not say to whom. If he gave it according to agreement it would be to Vidal or some one acting under him. Vidal says nothing whatever as to whether possession was or was not given to him.

He says he told plaintiff he had no power to extend the time.

Mr. Gurd says nothing as to when or to whom possession was given—that he told plaintiff he had no power to extend the time.

Mr. Lister for defendant objected that the extension of the time mentioned is by parol—should be in writing; that time is of the essence of the contract.

That an agreement not under seal, made before breach for extending the time of performance, is void.

That defendant cannot be sued as executor under this agreement.

On these objections (I presume) a nonsuit with costs was awarded.

As to the last objection I hardly see its importance.

The defendant makes this agreement personally, alleging that Dainty is his tenant, referring to annexed lease. Beyond the fact that he was Miss Cameron's executor, we know nothing. We must assume that he knew what his estate and interest was when he declared Dainty to be his tenant.

If there was any error in calling him executor when he was under a personal contract with the plaintiff it could easily have been amended. But it is consistent with the statement that he might have been trustee of the demised premises as well as executor of the lessor.

Then as to the objection that there was no legal extension of the time, it amounts to this, that the time never was in fact extended, and the contract remained to deliver up possession on the 1st February.

Now, we are not called upon to discuss how the case would be if the plaintiff had refused to deliver up possession on request. Nothing of the kind took place here. I am not prepared to hold that the mere omission or neglect to deliver up possession—no one asking for or demanding it—on the day named, was in itself a bar to the plaintiff's claim.

So far from the defendant objecting to the plaintiff's remaining beyond the day named, he states that he told him he had nothing to do with the matter.

The plaintiff says that the defendant said he had personally no objection.

But I think the agreement has been construed too narrowly, and that it does not cease to be binding merely because possession was not given on the day fixed. The plaintiff binds himself to surrender on the 1st February, to pay rent until possession is given, and that if possession is not then given up he may be proceeded against as an overholding tenant without color of right. He thus completely alters his own status, and gives full power to the defendant to enforce his removal. If this were a valuable term for 21 or 99 years, and the tenant had contracted as here, I think the law would be in a very unsatisfactory state if a few days' or weeks' omission to quit possession must necessarily enable the landlord to thus put an end to the term without paying the stipulated consideration. If, as already noticed, the tenant had been actively refusing to give possession when requested, a different question might arise. Here it is a simple non-feasance on his part—no one objecting, and I cannot agree that anything is shewn to warrant our holding his remedy for the consideration to be lost,

The law must be the same in this case, where the original term expired in the November following the agreement, as where it lasted for a long term of years.

The plaintiff has, as far as we can see, in substance given what he contracted to give, and it cannot be because the projected sale of the premises seems not to have been perfected that he should thereby lose his right.

If the nonsuit be upheld; we would be holding that a single day's delay or omission in giving possession on the day originally named, from any cause, would be an absolute bar.

I see no reason why the defendant is not personally bound on this agreement.

I think the appeal must be allowed with costs, and the nonsuit below set aside with costs, and a new trial directed, with costs to be paid by the defendant.

BURTON, J. A.—As the case is going down for a new trial it is inexpedient to express any opinion upon the facts or of the merits, but it may not be unworthy of consideration on another trial whether, although the payment of the money was not to be made until full possession was given of the premises, the agreement to give such possession and not the performance of it constituted the consideration for the agreement to pay the money, in which case much of the discussion which took place before us on the argument would have no application.

PATTERSON and OSLER, J.J.A., concurred.

DILLON v. TOWNSHIP OF RALEIGH.

Municipal corporation—Drainage—Distribution of moneys assessed—Ratepayer and contractor—Refunding excess of assessment.

On the petition of the plaintiff and other ratepayers in the township of Raleigh, the municipal council passed a by-law for the construction of the Kersey drain and the assessment of the lands which would be benefited thereby, amongst others those of the plaintiff; and in pursuance of such by-law the amount estimated to be requisite for the execution of the work was raised by such assessment. After the drain had been constructed and accepted by the council from the contractors as completed, a balance remained in the hands of the municipality of about \$2,000, which, in compliance with a petition presented by the plaintiff and other contributories to the fund, was refunded ratably to them.

The plaintiff had himself been allotted a section of the work for construction, and had been paid therefor, although he had not fully carried out his contract.

Subsequently, and after the defendants had so disbursed the full amount of such assessment, the plaintiff claimed to have discovered that the drain had not been properly constructed according to the plans, specifications and profiles of the engineer employed to lay out the same, and sought on behalf of himself and other ratepayers to compel the municipality to complete the drain according to such plans, &c.

Held, [reversing the judgment of FERGUSON, J.] that the plaintiff being himself a defaulter in the performance of his contract and having been a party to procuring a distribution of the surplus of the fund which otherwise might have been devoted to attaining the object sought by him, could not require the council to execute work which they had not the means to pay for.

Where a person suing on behalf of himself and others is disentitled to sue on his own behalf he cannot do so on behalf of the others interested.

Sections 570, 574, 584, 587, 589, 592 of the Municipal Act 46 Vict. ch. 18, (O.) [relating to the powers of municipal councils as to drainage, &c.] considered and explained.

THIS was an action instituted in the Chancery Division by Martin Dillon, suing on behalf of himself and all others, ratepayers assessed for the construction of the Kersey drain in the township of Raleigh against the Municipal Council of the township, setting forth that the defendants, in pursuance of the Municipal Act, passed a by-law for the construction of such drain, the estimated cost of which was \$5,949 and assessed certain lands in the township which would be benefited thereby, amongst others the lands of the plaintiff, which amount the defendants subsequently raised by the issue of debentures of the municipality. That the defendants obtained plans and specifications for the construction of said drain which was given to

certain contractors for the purpose of being constructed in accordance with such plans and specifications, but the same was not so constructed, on the contrary, not more than one-half of the work called for by the plans and specifications, as also the contract, was done upon such drain and the same was not sufficient, and did not in any way correspond in size or efficiency with the ditch for which the assessment had been levied, or which the parties assessed expected and required for the drainage of their lands; notwithstanding which the defendants accepted the same from the contractors and paid them the agreed price therefor. There was a further claim which was abandoned at the trial.

The action came on to be tried before Ferguson, J., at Chatham, on the 17th, 18th, and 19th of June, 1885, when at the close judgment was given declaring the plaintiff entitled "to have the said Kersey drain constructed according to the report, plans, and profiles of the said engineer * * and this court doth further order and adjudge that the defendants do within six months from this date, construct and complete the drain according to the plan, profile, and report of the said engineer * * and that the defendants do pay the plaintiff the costs," &c.

From this judgment the defendants appealed, and the appeal came on to be heard before this court on the 10th and 11th of March, 1886.*

The other facts appear in the judgment.

Moss, Q. C., and M. Wilson, for the appellants. The evidence establishes that the plaintiff had actually been employed in carrying out the work, and had been paid for the work done by him, which payment he accepted with full knowledge of its improper construction, having done so he cannot now be heard to complain of the work and ask that the defendants should be compelled to do that which he should have done himself. The plaintiff by his acquiescence in the acts of the defendants, and by his own acts and conduct is estopped from sustaining the claim for

* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

which he has obtained judgment. In any event, however, the plaintiff cannot maintain this action without either the Attorney-General or the contractors for the execution of the work being parties thereto.

Douglas, Q. C., for the respondent. The defendants having undertaken the duty of constructing the drain, and having let the contract and taken sufficient security for the performance thereof according to the plans and specifications, were bound to have the work performed in accordance with the contracts, and having paid the contract price and accepted the work with full notice that it had not been properly performed, they are liable to the persons interested in the drain, and who were assessed therefor. The plaintiff was in no way party to the non-completion of the drain, and the acceptance by him and others of the surplus over what the drain was contracted to be properly constructed for, is no ground of estoppel, and the plaintiff did no act whereby the position of the defendants was altered as to the non-construction of the drain. The plaintiff sues on behalf of himself and other ratepayers, and even if there were any grounds of objection personal to the plaintiff, still it would not affect this suit, there being other interests than his affected. The plaintiff has such a personal interest in this drain that he can maintain this action without the intervention of the Attorney-General, and if the contractors should have been made parties it was the defendants' duty to have done so, but the plaintiff's right is against the defendants only.

The following authorities were referred to: *Watson v. Orangeville*, 5 O. R. 37; *Peck v. Galt*, 46 U. C. R. 211; *Smith v. Raleigh*, 3 O. R. 403; *Gibbs v. Mersey Docks Co.*, 1 H. L. 93; *Coe v. Wise*, L. R. 1 Q. B. 611; *Fairbairn v. Sandwich East*, 32 U. C. R. 573; *Misener v. Wainfleet*, 46 U. C. R. 457; *Kiely v. Smith*, 27 Gr. 220; *Beemer v. Oliver* 3 O. R. 526, 527, and 10 A. R. 656; *County of Hastings v. Ponton*, 5 A. R. 543; *Miller v. Hamlin*, 2 O. R. 103; *Gardner v. Kleopfer*, 7 O. R. 603; *Lincoln v. Wright*, 4 Beav. 427; *Frontenac v. Kingston*. 30 U. C. R. 584; *His-*

cox v. Lauder, 24 Gr. 250; *Scott v. Peterborough*, 19 U. C. R. 469; *Addison v. Mayor of Preston*, 12 C. B. 134.

April 20, 1886. OSLER, J. A.—The plaintiff sues in this action, as well on his own behalf, as on behalf of all others, ratepayers assessed for the construction of the Kersey drain in the township of Raleigh.

The statement of claim alleges that the defendants, pursuant to the provisions of the Municipal Act respecting drainage, passed a by-law for the construction of the Kersey drain, and assessed certain lands, including the plaintiff's land, therefor, the estimated cost being about \$5,949, which amount they raised by the issue of debentures under the by-law. That they procured plans and specifications of the necessary works, and entered into construction contracts therefor, but the contractors did not make the drain in accordance with the plans, &c., but on the contrary did not do one-half the work described in the plans and contracts, and the drain was not sufficient, and did not in any way correspond in size and efficiency with that for which the assessment was levied, or which the parties assessed required, notwithstanding which the defendants accepted the drain from the contractors and paid them therefor.

The plaintiff claimed that the defendants might be ordered to complete the drain, and to make it as large and efficient as was contemplated by the plans and specifications.

A further demand was set out in the statement of claim, but it was abandoned at the trial on the close of the case.

By their statement of defence the defendants allege that after the work in connection with the drain was done, and while the plaintiff was aware of the condition thereof, and while a surplus of moneys (nearly \$2,000) raised by the defendants therefor remained unexpended by them, the plaintiff and others petitioned the defendants to refund to them such surplus, and thereupon the defendants

paid the plaintiff and others the whole amount thereof, and the defendants have no moneys belonging to the fund raised for the drain.

Further, the defendants say that even if they had no authority to do what they have done, yet they acted *bonâ fide* and in the best interest of all concerned, and the plaintiff acquiesced therein, and by his acts and conduct should be estopped, &c.

The action was tried before Mr Justice Ferguson at Chatham.

It appeared that in the year 1881 a by-law was passed upon the petition of the plaintiff and other ratepayers of the township of Raleigh for the construction of the drain mentioned in the pleadings called the Kersey drain, and the usual proceedings required by the Municipal Act were taken, viz : an examination by an engineer or surveyor of the locality proposed to be drained ; plans and estimates of the work prepared, and an assessment made of the real property to be benefited by it.

The estimated cost, assessed on lands and roads, was \$5,949.

By the by-law it was provided that the contract for the construction of the drain should be let to the lowest bidder, not exceeding the estimate, and that every contractor should give a bond to the corporation, with one surety for the due completion and performance of his contract according to the plans and specifications, and within the time mentioned, and a member of the Council was appointed commissioner "to cause the said drain and works to be constructed in accordance with the plans, etc., and to grant orders on the Treasurer to each contractor up to 20 per cent; of the amount due, until the completion of the contract and the due acceptance of the work by the engineer laying out the same."

Debentures were issued under the by-law, by the sale of which the estimated cost of the work was realised.

During the months of September and October, 1882, the work was let in sections to some 18 or 20 contractors, who

were farmers residing along the line of the drain, for different sums, amounting in the aggregate to \$4,000.

Each contractor gave the security required by the by-law. Each was entirely independent of the other, and did the work on the section taken by him as and when he thought proper.

In the latter part of the year 1883, Mr. McDonell, the surveyor who had laid out the drain and prepared the plans and specifications, reported to the Council that the drain as then constructed was not deep enough, and required more to be taken out of the bottom from beginning to end.

This report was naturally unsatisfactory to the contractors. It was also unsatisfactory to the commissioner, who, on the 6th December, 1883, reported to the Council that the engineer on the Kersey drain was prejudiced against the township and would not pass the drain, and he therefore asked that another surveyor should be appointed to examine it, as he was of opinion that the drain was complete with the exception of two or three places.

He gave the following evidence :

Mr. Wilson—Dec. 6th, 1883, you made that report, didn't you ? A. Yes.

Q. How did you come to recommend the change of engineers ? A. Well, from the complaints of ratepayers along the drain that were dissatisfied with Mr McDonell's reports.

Q. Did the plaintiff say anything ? A. Yes, he made a great many complaints ; he made a great many complaints against Mr McDonell.

Q. Did he make any request of you ? A. Yes, he wanted another engineer, and in fact spoke of employing one himself if we would not get one.

Q. He objected to Mr. McDonell and wanted you to get another engineer ? A. Yes, he said Mr. McDonell would never pass the drain.

Q. Why ? A. Because he was prejudiced against the Township, or words to that effect.

Q. And did he suggest any person to get ? A. Yes, Mr. McGeorge was the person that he suggested getting.

Q. After you made that report the engineer was changed ? A. Yes.

Q. Mr. McGeorge was appointed by the Council? A. Yes.

Q. The ratepayers were very much annoyed at Mr. McDonell for not passing this ditch? A. Yes.

Q. They were mad at him about trying to make a big ditch? They were not mad about making the big ditch, but they did not think he was doing justice; they considered that he would not pass the drain anyway, and that was Mr Dillon's complaint, that he would not pass the drain anyway.

Q. Is Dillon the ratepayers you refer to? A. He is one.

Alexander Goulet, another witness, said :

Q. Do you remember the time when there was a change made in the engineer. Do you remember how that came about? A. Mr. Dillon came to the Town Hall along with other ratepayers together with a complaint that Mr. McDonell would never pass the drain.

Q. And Mr. McGeorge was appointed? A. Yes.

On the 10th December, 1883, McGeorge reported to the Council that, with the exception of a few defects pointed out, which ought to be corrected in order "to bring the drain up to the intentions of the engineer," it was a very good drain. These defects, he thought, might be left to the commissioner to remedy.

On the 20th December, 1883, the commissioner reported that he had caused the repairs recommended by McGeorge to be done, with two exceptions, and advised that payment should be made to the contractors who had completed their contracts, and that a certain drawback should be made in the case of the two who had not.

On the 6th December the ratepayers assessed for the Kersey drain petitioned the Council to cause "the surplus on that drain" to be refunded. The petition was signed by thirty-two ratepayers, including the plaintiff.

A meeting of the Council was held about the 28th December, at which the plaintiff and many of the contractors and ratepayers assessed for the drain were present. There was discussion as to the balance due to some of the contractors, and as to the amount of the refund to which each was entitled, and there was some dispute between the

plaintiff and the Council as to both. It was said that the plaintiff also complained that the work on the drain had as a whole been improperly done, and that part of the moneys raised under the by-law had been misappropriated in repairing another drain with which the Kersey drain was connected. It appeared that the plaintiff himself had not performed his contract in accordance with the original plans and specifications, and had not constructed his section on the course laid out by the engineer, but had diverted it into another and shallower course. In his examination before the trial put in by the defendants he said :

"I thought when I did my work in the Kersey that it was sufficient, but the engineer McDonell came and said that it wanted more taken out of it; about ten inches and two feet, I think, required taking out at section 1; that additional quantity was never taken out; I hadn't received my pay when I learned that I had not done the work right; I had received part of it but not all; I subsequently received it all except \$52.42; that was kept back and has been kept back."

In the end plaintiff was paid, and accepted \$77.60 as his share of the refund, and was also paid the balance due him on his contract account, \$52.42, above mentioned.

The other ratepayers also accepted and received their share of the refund.

The defendants contend that this settlement was made on the express understanding that all claims and demands against the Council in regard to the drain were abandoned, and were not to form the subject of future litigation.

Much evidence was given as to the defective condition of the drain when it was taken over from the contractors. The defendants offered to prove that even if it had not been done in accordance with the specifications it was sufficient for all the purposes it was required. This evidence was rejected by the learned Judge, who at the close of the case gave judgment for the plaintiff, from which the defendants now appeal.

The following extract from the report printed in the appeal book will shew the ground on which he proceeded :

"In regard to the completion of the drain it appears to me beyond all doubt that the drain has not been done in accordance with the mode pointed out by the engineer in the first place. It has not been done nor nearly done. The parties who were called upon to pay the moneys are entitled to have that drain made. There has been ample time to have it made, and it has not been completed. The defendants say, they do not want any more time, that they have done all they intend to do, but it will require a blind man to say that the work has been done as the defendants contend. Even if they were at liberty to say that a sufficient drain has been made, I do think that would do; but I have nothing to do with that; I think it appears from the evidence that has been given that the drain is by no means sufficient, but that is not material. I think in that respect the issue is simply, have they made the drain that was pointed out by the engineer to be made? and, as I have said, the evidence is abundant that they have not. I think there was an act very unjustifiable—the changing of engineers under the circumstances that have been made to appear—and the results shew it very plainly. The pretext that the ratepayers were not satisfied with Mr McDonell was certainly without foundation as far as the evidence goes. Those who were called the ratepayers, emphatically, were three, or perhaps four, who were contractors or had something to do with the work. There is nothing to shew that the ratepayers called upon to pay the money were dissatisfied with Mr McDonell, and if it were necessary on the evidence to find on the subject I may say that the strong indication is that there was a scheme, perhaps engendered by the contractors, to remove Mr. McDonell or cause him to be removed for the purpose of getting the matter in such shape that the partial work they had done might be passed for the performance of their contract in digging the ditch."

As to the alleged estoppel the learned judge held that nothing was proved which could constitute an estoppel upon the plaintiff.

The judgment declares that the drain has not been constructed according to the plans, etc., of the engineer McDonell, and declares that the plaintiff is entitled to have the drain so constructed, and orders the defendants so to construct and complete it within six months.

The question of the plaintiff's right to recover in this action involves some considerations which do not appear to have been presented to the learned Judge at the trial, so far as appears from his judgment.

The plaintiff does not sue in respect of any special damage sustained by him in consequence of the non-construction or negligent construction of the drain.

The object of the suit is to compel the defendants to construct and complete it in accordance with the plans and specifications prepared by the engineer who laid it out.

Their answer is that they have no fund at their disposal out of which they can do so: that they expended part of the fund raised for the purpose of making the drain, in paying for what has already been done, and that the remainder was, on the application of those persons, including the plaintiff, who are interested in and assessed for the construction of the drain, divided among and paid to them pro rata.

This answer is true in fact. Is it in point of law a good defence to the plaintiff's application for a mandamus?

The defendants are entrusted by statute with the duty under certain circumstances of constructing drainage works. A special fund is to be raised for the purpose in a particular manner, and from a limited class of ratepayers, those, namely, whose property is benefited by the work.

A brief glance at the relative clauses of the Municipal Act, 46 Vict., ch. 18 (O), will shew how carefully the legislature has provided for placing the burden of the construction and maintenance of these works upon the property benefited thereby, and not upon the general funds of the municipality. Section 570. In case the majority in number of the owners of the property to be benefited petition the council for the deepening of any watercourse, or for the draining of a described locality, the Council may pass a by-law:

(a) For providing for the proposed work being done.

(b) For borrowing on the credit of the municipality the necessary funds by issuing debentures, which are to

be provided for by assessing and levying upon the property to be benefited a special rate sufficient therefor in the same manner as taxes are levied.

Passing over matters of detail we come to section 574. In case a by-law, which has been acted upon by the construction of the works in whole or in part, does not provide sufficient means, or provides more than sufficient means, for the completion of the works, the Council may from time to time amend it in order to fully carry out the intention thereof and of the petition on which it was founded.

Several sections follow relating to cases where the work is continued into another municipality or benefits lands or roads therein : arbitration clauses, &c.

Section 584 enacts that after the work has been completed each municipality is to preserve, maintain and keep the same in repair within its own limits, and that any municipality neglecting to repair, &c., may be compelled by mandamus to do so, and shall besides be liable for damages to anyone whose property is injuriously affected by such neglect, &c.

This section was considered and acted upon in *White v. Gosfield*, 2 O. R., 287 ; 10 A. R. 555.

Then section 587 provides that in any case where, after the work is fully made and completed, it has not been continued into any other municipality than that in which it was commenced, or wherein the lands or roads of any other municipality are not benefited, it shall be the duty of the municipality making the work to preserve, maintain and keep it in repair at the expense of the lots, parts of lots and roads, as the case may be, as agreed upon and shewn in the by-law.

Sub-sec. 2 : When any similar work has, prior to 10 February, 1876, been constructed by the municipality and paid for out of the general funds, a by-law may be passed for the purpose of maintaining and keeping it repaired at the expense of the lands benefited.

Sec. 589 : When the repairs required to be made under

sections 584 or 587 are so extensive that the Council do not think it expedient to levy the whole in one year, the amount may be raised by debentures, and a special rate levied upon the property benefited.

Sec. 592 : When damages are recovered against the corporation constructing drainage works on account of proceedings taken under the Act, beyond the amounts taken into consideration in estimating the cost of the works, the lands liable to assessment for the drain shall be charged with the amount recovered pro rata.

The effect of these sections would appear to be that a municipality has no power to construct or to repair a drain under the drainage clauses of the Act, except in the manner and by resorting to the means there provided for so doing. Where the fund applicable to such a purpose has been raised and received by the Council the municipality may be bound to make it good to the extent to which it has been misappropriated or diverted from its proper object, as was the case in *Smith v. Raleigh*, 3 O. R. 405.

So, too, where the duty arises to repair a drain already constructed a decree may be made to enforce it, the municipality being bound to procure the necessary funds in the manner pointed out by the act, viz : by local assessment, as in *White v. Gosfield*, though it may be a question whether the *damages* recovered in that case were such as would be ultimately chargeable upon the lands liable to assessment for the drain, under sec. 592 or otherwise.

This action is not one of that character, its object being to enforce the completion of the drain according to the original scheme of its construction.

That is a case provided for by section 574, according to which, if the by-law does not provide sufficient means for the purpose, it may be amended so as to raise the necessary amount by an additional or increased assessment upon the property benefited.

On the other hand, by the same section, if more than sufficient means is provided, the by-law may be amended by reducing the original assessment.

The plaintiff's complaint, however, is not that sufficient means were not provided, but that those which were provided were misapplied or misappropriated, and his contention appears to be that the Council were bound to have the drain completely constructed for the \$4,000, for which they procured contracts to have it made, and that the difference between that sum and the amount of the original estimates was a sum which the ratepayers were in any event entitled to have paid over to them or applied in reduction of their assessment.

I do not entirely agree with that contention. I think the Council and the ratepayers might very well agree to deal with the surplus fund as they have dealt with it, all parties being satisfied that the drain could be properly constructed for \$4000.

On the other hand, the Council were at liberty to say that it could not be known until the completion of the drain whether the by-law had provided more than sufficient means for the purpose, and therefore to retain the surplus until it could be seen that it was unnecessary from the failure of the contractors or other reasons to resort to it. If they had it now in hand I think they might expend it as far as it would go, or as far as might be necessary in completing the drain and complying with the decree. The question then is, whether there has been any misappropriation or diversion of the fund by the municipality of which the plaintiff is entitled to complain?

His allegation is, that the defendants accepted the drain from the contractors and paid them for it, although it was not completed in accordance with the plans and specifications.

We have nothing to do with the expenditure upon the Gilhuly drain, as the claim in respect of that was given up at the close of the case, and is not the subject of appeal.

The status or qualification of the plaintiff to maintain the action on behalf of himself and all other ratepayers assessed for the construction of the drain is strongly excepted to.

The rule is very clearly laid down by Lord Justice Knight Bruce in *Bruce v. The British National Life Assurance Company*, 4 De G. & J. 157, 174.

That was an action by a director of the defendant company to impeach certain transactions of his fellow directors entered into before he became a director, but which he had subsequently allowed them to suppose he had affirmed and adopted in dealings founded on such transaction. The Lord Justice says that the plaintiff "has sued on behalf of himself and others, and I assume that there still exist persons who have a right to complain of these transactions. But that will not give the plaintiff a title to sue for them. As on the one hand a plaintiff who has a right to complain of an act done to a numerous society, of which he is a member, is entitled to sue on behalf of himself and all others similarly interested, though no other may wish to sue, so, although there are a hundred who wish to institute a suit, and are entitled to sue, still if they sue by a plaintiff only who has personally precluded himself from suing, that suit cannot proceed."

The same rule is stated in Daniell's Ch. Pr. 5 ed. p. 215, and many authorities bearing it out are referred to by Harrison C. J., in *Reg. ex. rel. Regis v. Cusac*, 6 P. R. 303; *Fenton v. Simcoe*, 10 O. R. 27, 42.

It is very clearly proved, and the plaintiff does not deny it, that all the contractors, including the plaintiff himself, were dissatisfied with the strict and unyielding character of McDonell's inspection and report, and that it was at their instance that he was discharged and McGeorge appointed. The plaintiff himself, so far from complying with the terms of his contract, altered the course of the section undertaken by him in order to lighten the work and diminish the cost, but even so did not excavate it to the required or a sufficient depth. He was therefore himself a defaulter. I think it is very probable that McDonell's dismissal and McGeorge's appointment were for the express purpose of making matters more easy for the contractors, and that they expected and believed that it would have that effect.

In my opinion the plaintiff, as one who had made

default in the performance of his own contract, and who complained of McDonell and aided in procuring McGeorge's appointment, cannot now in his character of ratepayer complain that the Council paid the contractors and accepted the work on McGeorge's report.

I think he could not sue on his own behalf, and the authorities I have mentioned shew that he cannot do so on behalf of others interested, if any others such there be who are entitled to complain.

Apart from this, while I by no means wish to decide that a ratepayer, who is not disqualified, might not maintain an action against the municipality upon making out a proper case of collusion or improper dealing with the contractors, I consider that there is great difficulty in holding that what was thus done by the Council at the instance of the contractors, was such a misappropriation or misapplication of the fund as to entitle the plaintiff to a decree which could only be carried out at the expense of the general body of the ratepayers.

It is not alleged that the defendants acted in bad faith. All the contractors were farmers residing along the line of the drain, and were presumably ratepayers assessed for its construction. If they were satisfied with what had been done, the Council would not feel called upon to exact a strict compliance with the terms of their contracts.

It is noticeable that only one ratepayer was called who was dissatisfied with the drain or spoke of its insufficiency, while the defendants' evidence that the drain was sufficient to carry off the water and drain the land was rejected.

The plaintiff is in precisely the same position with regard to the so-called surplus fund divided by the Council between himself and the other ratepayers.

That was a fund to which the Council might have resorted to complete the drain if its non-completion had been complained of, but the plaintiff having been a party to procuring the Council to distribute it on the assumption that it would not be necessary to resort to it for the purposes of the drain, and, having assented to such distribution

by receiving a share of the fund, cannot now require the Council to execute a work which they have no means to pay for.

I therefore think, with great respect, that for the foregoing reasons the appeal should be allowed.

I desire to add that the appeal book appears to be unnecessarily long. I don't see why all the evidence relating to the expenditure upon the Gilhuly drain was printed. That was not a question in dispute, and there is page after page of the evidence given to let in secondary evidence of McDonell's report, and as to McDonell's credit, which is of no possible importance on the appeal. At a moderate estimate I think the appeal book is twenty pages too long.

HAGARTY, C. J. O., BURTON, and PATTERSON, JJ.A., concurred.

Appeal allowed, with costs.

PRENTICE V. THE CONSOLIDATED BANK.

Power of sale—Timber limits—Absolute assignment—Collateral security—Sale at gross undervalue.

The plaintiff, being indebted to the defendants as indorser in the sum of about \$7,000, and being pressed for payment, which he was unable to make, transferred to the defendants certain timber limits, which he stated had cost him \$25,000, to hold as security for his indebtedness, and for the purpose of enabling them to sell it and realize their debt. The regulations of the Crown Lands Department, however, forbade the recognition of any conditional transfer, and therefore the assignment was in terms absolute. The defendants, without adopting any means of ascertaining the probable value of the limits, offered them for sale by public auction, with the assent of the plaintiff, when, no sufficient offer having been made, they were withdrawn, and, without having made any further inquiry as to value, they were sold by private sale, without consulting the plaintiff for \$6,000. The limits were subsequently sold by the purchaser for a very large sum. Previous to the attempted sale by auction the defendants had received several offers of sums more than sufficient to pay off their claim.

In an action brought by the plaintiff against the defendants for selling at a grossly inadequate price, ARMOUR, J., gave judgment in favour of the plaintiff, with \$19,654.38 damages, which, on appeal to this Court, was affirmed with costs, HAGARTY, C. J. O., dissenting, on the ground that, under all the circumstances, there should be a new trial for the purpose of further investigation.

Per BURTON and PATTERSON, JJ.A. The defendants sold by private contract, without authorisation, and did not take proper steps to have the limits valued.

Per OSLER, J.A. The defendants were bound to exercise proper care and discretion, and to adopt such means as would be adopted by a prudent man to get the best price that could be obtained.

THIS was an action instituted in the Common Pleas Division by Alexander Prentice against The Consolidated Bank of Canada, in which it was alleged that defendants held a promissory note of A. Prentice & Son, indorsed by the plaintiff, for \$7,000, dated 19th August, 1878, maturing on the 22nd November following, and that the bank was pressing for payment thereof, in consequence of which plaintiff assigned to the bank certain licenses issued by the Crown Lands Department to cut timber over five named berths, containing about thirty-six square miles on the north shore of Lake Huron, estimated by the plaintiff to be worth \$80,000 or \$100,000: that such assignment was made as collateral security only, though absolute in form, as by the rules and regulations of the department no mortgage of licenses so issued was permitted or recognised: that by accepting such assignment the defendants became

and were trustees of the said limits for the purpose of securing to the bank payment of the plaintiff's indebtedness, and subject thereto for the benefit of the plaintiff.

The plaintiff further alleged that the bank, in disregard of their duty as such trustees, did, on or about the 19th of January, 1881, sell the said limits for the grossly inadequate sum of \$6,000, and that before the plaintiff became aware of such sale the defendants had transferred the limits to an innocent purchaser, who purchased without notice of such breach of trust, and who consequently held the same freed and discharged of and from any right or claim of the plaintiff thereto.

It further appeared that proceedings had been taken by the Canadian Securities Company, to whom the said note had been transferred, against the plaintiff to enforce payment of \$4,500, being the amount of principal and interest alleged to be remaining due in respect of such note.

The claim of the plaintiff was, that it might be declared that the defendants had by their conduct been guilty of a breach of trust in so disposing of the said limits; and that they might be ordered to make good to the plaintiff the full value thereof after deducting the amount of such note and interest; and that they might be ordered to indemnify the plaintiff against the claim of the Canadian Securities Company.

The defendants insisted that they had acted in good faith and had procured the best price obtainable for the property.

The trial came on before Armour, J., without a jury, at the sittings of the court at Toronto in October, 1882, when after hearing the evidence, the more important parts of which appear in the present judgments, his Lordship gave judgment in favor of the plaintiff for \$19,654.38, with full costs of suit.

From this judgment the defendants appealed, and the appeal came on for hearing on the 18th and 19th of November, 1885.*

**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

S. H. Blake, Q.C., and J. K. Kerr, Q.C., for the appellants.
McCarthy, Q.C., and Creelman, for the respondent.

The other facts of the case and the authorities relied on appear in the judgments.

February 25th, 1886. BURTON, J. A.—If the learned Judge, whose judgment is appealed from, intended to hold that the assignment and the circumstances attendant upon, and following it constituted the transaction a mortgage with an unlimited power of sale, such as is usually to be found in well drawn instruments of that character, I should hesitate about coming to the conclusion at which he has arrived.

The power of sale in such instruments is the contract of the parties; it may, no doubt, as was said in *Jones v. Matther*, 11 Jur. 504, be used for purposes of oppression, but when conferred, it must be remembered that it is so by a bargain between one party and the other, and it is for the party who borrows to consider whether he is not giving too large a power to him with whom he is dealing.

And it is immaterial whether the mortgage is in the usual form with a power of sale, or a conveyance in fee with a trust for sale; in either case the parties have by agreement placed the power in the hands of the mortgagee unfettered by conditions and, in the case of a trust deed, it is not a trust which the mortgagor can enforce so that the mortgagee is not thereby made a trustee for the mortgagor.

Apart therefore from the effect to be given to the correspondence, the transfer to the bank vested the title in them simply as security for the debt, giving no independent power of sale without the decree of the court. If however the debtor assented to a sale, to the extent to which that assent went he could not be heard to complain of it.

Negotiations for the transfer first took place with Mr. McCracken, a former manager of the bank, in February, 1879; he proposed to give time if he got security and the plaintiff says that he offered to give five years.

However that may be, these negotiations fell through, and the subsequent correspondence and negotiations were with Mr. Campbell who succeeded Mr. McCracken as manager; the plaintiff endeavoured to prevail upon him to accept part of the limits in question, in satisfaction of his debt to the bank, whilst the bank urged upon him to return and work them himself. The lumber business was, however, at the time in so depressed a condition that the plaintiff could not be induced to venture to do so, and on the 31st May the manager wrote that if the plaintiff would transfer the limits the bank would pay off the arrears due to the Government, and try to sell them. Adding that if they realised from 60 to 75 per cent. of the claim, they would release him from the balance.

If this promise had been adhered to we should in all probability never have heard of this suit.

Some other correspondence took place which unfortunately is not produced, and the plaintiff swears that the bank promised to hold these limits until they got a price for them that would satisfy him.

In another portion of his evidence he says that he felt confident from the assurances made to him that the bank would not sell for less than the amount of the debt.

Upon these assurances the plaintiff says the transfer was executed and sent to the bank.

On the 7th May, 1880, a letter was sent by the bank, which if received conveyed, to the plaintiff a distinct intimation that if the bank were not paid within a month they would sell the limits for the best price they could get.

The plaintiff denies that he ever received this letter.

The bank then took steps to have the property sold by auction, and if they had been thus disposed of there is abundant evidence of the consent of the plaintiff to their realising in that way.

They were subsequently sold by private contract without consultation with the plaintiff, to a person who had been for some months acting as agent for the bank, for about five cents an acre, a sum very far less than their actual value at that time.

It strikes one as strange that at a time when the value of this description of property was as Mr. Campbell admits in his correspondence beginning to rise in value, such a sale should have been completed without communication with the plaintiff, but this is rendered still stranger from the fact, that in reply to a letter from the plaintiff written some days after the sale wishing to be informed of the result of the auction, no reference is made to the sale which had four days previously been completed.

We had, he says, the sale of limits in September, as advertised, but could not get a bid, consequently there was no sale effected; and although, frequent applications were subsequently made by the plaintiff it was not until the month of August following that he was able to obtain any information.

It may well be questioned whether, if the plaintiff had been promptly advised of the sale to Miller, he might not successfully have impeached a sale made under such circumstances to a person who had been acting for the bank, in endeavouring to procure a purchaser: that relief was impossible at the time the plaintiff was informed of the sale as the land had then passed into the hands of bona fide purchasers at a largely increased price.

There are other circumstances in the case which may have influenced the learned judge, as for instance the statement made by the bank manager to Miller, that the plaintiff was insisting on a sale by auction, which would seem to be contrary to the fact, the auction sale having been resorted to under the advice of the solicitor and probably under an idea, very generally entertained, that a private sale could not safely be resorted to until an attempt had been made to effect a sale at auction, a precaution very proper and reasonable in itself, but which is sometimes erroneously supposed to warrant a subsequent private sale without the precautions usually regarded as necessary before an attempted sale by auction.

The damages awarded are large, and I should have been better pleased if they had been less, but I am unable to

discover any satisfactory ground for interfering with the finding, if a sale without consent would be illegal and the learned judge believed the evidence of the plaintiff that he was led to understand that the property would not be sold for less than the bank's claim. This sale was made without authority, and the damages under that state of facts are warranted by the evidence.

I am of opinion therefore that the appeal and cross-appeal should be dismissed.

I understand the learned Chief Justice to be of opinion that this judgment is not satisfactory and that consequently there should be a new trial. It seems to me with great deference, that such a course in a case like the present would be entirely opposed to the order of things contemplated by the Judicature Act.

There may be possible cases in which such a course might be proper, as for instance in the case of surprise, or the rejection of evidence, but even in such cases it is very unusual to grant a new trial, but to examine the additional witnesses before the Court of Appeal, and the tendency of all recent decisions in England is against it.

Lord Justice Bramwell states his views as usual very clearly and concisely in the case of *Jones v. Hough*, 5 Ex. D. 122: If, he says, upon the materials before the Judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion and not accept his finding, and he then points out the difference between the finding of a judge and that of a jury. When the jury find the facts the court cannot be substituted for them because the parties have agreed that the facts shall be decided by a jury, but where the judge finds the facts the Court of Appeal has the same jurisdiction, that he has and can find the facts whichever way they like.

If, therefore, upon the materials before the court, judgment ought to be given in any way different from that in which Mr. Justice Armour has given it, we ought to give that judgment.

The whole spirit and intent of the Act is to have the whole matter disposed of either by the judge of first instance, or by the court. It is true that the court are very properly unwilling to interfere with the conclusion which the judge has arrived at upon a question of fact, when he has had the opportunity of seeing the witnesses which this court has not; but although that is not usual it is in the power of the court to arrive at a different conclusion.

The unexplained fact as to the delays in informing the plaintiff of the sale, might have been of importance if this were an action imputing fraud or mala fides to the agent of the bank, but can have no bearing on the question of whether the bank was negligent in the sale, or sold without authority.

I agree with the views taken of the matter by a judge of very high authority, the late Lord Justice Thesiger, that a judgment of this kind is to be dealt with by this court as it would have been before the old Court of Appeal in Chancery, under similar circumstances, upon appeal from a Vice-Chancellor; and that in no case was a motion for a new trial necessary except upon the ground of surprise, and even upon that motion instead of sending back the case to the judge who tried it, it might itself instead of doing that take the additional evidence and so try the whole case.

It is not in this case suggested that there was any surprise or any evidence improperly rejected, and with great deference I think we would not be acting in the spirit of the Judicature Act in directing a new trial whatever views we may take of the decision upon the evidence.

PATTERSON, J. A., concurred.

OSLER, J. A.—It was held in *Bennett v. O'Meara*, 15 Gr. 396, that timber limits are personal estate or property, and they may perhaps (as was so strongly contended) even as chattels real, be the subject of a pledge, *Dewey v. Bowman*

8 Cal. 145. But it seems to me not important in this case to determine the rather nice question whether the transaction between Prentice and the bank constituted in point of law a pledge, or a mortgage with a trust for sale. On the one hand, there is the actual transfer of the title to the property instead of the mere deposit or transfer of the possession of the documents of title, and on the other the absence of any expressed condition or defeasance, on non-performance of which only the defendant's right to sell could arise or be exercised. What the correspondence between the parties discloses is a transfer from a debtor to his creditors of certain property as collateral security expressly for the purpose of enabling them to sell it, and to realise their debt out of the proceeds.

The defendants' manager writes: "I would propose that you send us transfer (of the limits), and we will try and sell them. If we succeed in realizing a percentage of your debt to us of say 60 to 75 cents on the dollar, we will then discharge you," &c.

The plaintiff answers, "Enclosed find transfer of timber limits. I trust you will make them well known before you dispose of them. They ought to bring \$40,000 if properly handled, which I trust you will."

Whether the defendants were constituted pledgees with a present right or power to sell without further notice or demand of payment, or mortgagees with a trust for sale, is, as I have said, of no consequence. Their right was, under the circumstances, as extensive, and their duty and responsibility, if they undertook to exercise it, was as great in the one case as in the other. Were it necessary to define their position, I should be disposed to say that they were mortgagees with a trust for sale as distinguished from a power: see *Locking v. Parker*, L. R. 8 Ch. 30. In *Re Alison, Johnson v. Mounsey*, 11 Ch. D. 284.

The plaintiff's case is that there was a valid sale of his property, but that the trust or power was negligently and imprudently exercised.

The ninth paragraph of the statement of claim, in my judgment, accurately enough states the defendants' duty, which was at the least as high as that of a mortgagee who sells

under a power of sale. They were bound to exercise proper care and discretion, and to adopt such means as would be adopted by a prudent man to get the best price that could be obtained.

The following authorities shew this to be the law :

In *Orme v. Wright*, 3 Jur. 19, 972, it is laid down by Lord Langdale, M. R., and afterwards by Lord Cottenham, in appeal, that it is the duty of a mortgagee with a power of sale to use every exertion to sell the property at the best price. The former observes :

“Can this be considered a proper sale by a trustee? Can there be any doubt that a trustee should use all the means in his power to get the fairest and best price for the property? He was a trustee not only for his own benefit, but for the benefit of another person, and that person was the plaintiff. It was not a proper exercise of his discretion, and the sale was not such as to make the best of the property.”

In *Jenkins v. Jones*, 2 Giff. 99, 108, the Vice-Chancellor says :

“It is well settled that though a mortgagee’s power of sale confers a clear right, it must be exercised with a due regard to the purpose for which it is given. A mortgagee with such a power stands in a fiduciary character, and unlike an ordinary vendor selling what is his own, he must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagor of any surplus that may remain.”

Fisher on Mortgages (1876) p. 495, sec. 809 :

“The sale must be effected with proper discretion, for the mortgagee, as a trustee for persons interested in the equity of redemption is bound to adopt such means as would be adopted by a prudent owner to get the best price that can reasonably be had.”

Coote on Mortgages, 5th ed. 1885, p. 276, is to the same effect. The same rule is laid down in many other cases in England and in our own courts. It will be sufficient to refer to : *Richmond v. Evans*, 8 Gr. 508, and *Latch v. Furlong*, 12 Gr. 303, *Marky v. Lanfer*, 92 U. S. S. C. R. 142, 155, and *The National Bank of Australia v. The United Hand-in-Hand Company*, 4

App. Cas. 391. The head-note of the last case accurately states one of the propositions affirmed by the judgment, namely, that a mortgagee is chargeable with the full value of the property sold, if from want of care and diligence it has been sold at an under value.

There is a clear distinction between a case like the present, where it is sought to charge the mortgagees with damages resulting from their negligence and want of care in selling the property at an inadequate price, and a case where the object of the suit is to set aside the sale itself. In the latter case, as was held in *Warner v. Jacob*, 20 Ch. D. 220, following *Davey v. Bowman*, 1 DeG. & J. 535, 577, the court will not interfere if the power of sale has been exercised bonâ fide, and for the purpose of realising the debt, and without collusion with the purchaser, even though the sale be very disadvantageous, unless the price be so low as in itself to be evidence of fraud.

In *Warner v. Jacob*, it was not proved that the sale was at an undervalue, and Mr. Justice Kay expressly distinguished between the two kinds of relief there sought, observing that the sale could not be set aside, and that no case had been made out for damages in respect of it.

If the legal position of the defendants and the consequence of neglect or breach of duty on their part has been rightly stated, the case at the trial resolved itself mainly into the question of fact: were the defendants guilty of negligence in selling the plaintiff's limits in the manner and for the price they did; and we have to say whether the evidence fairly supports the learned judge's findings against them on this point.

As we have not the advantage of any written or reported judgment of his, I think it right to examine and refer to the evidence more fully than I should otherwise have thought it necessary to do.

The only information the defendants appear to have received from the plaintiff about the limits when they were assigned to them was that he had explored a large part of them himself, that they were well timbered and valuable, and had cost him \$25,000.

Some time after the transfer, the defendants informed brokers and others in Montreal, Toronto, and elsewhere that the limits were for sale, and invited offers with a view of disposing of them by private sale. They received several among others three of \$15,000 cash, which seems to have been the price they had determined to hold them at, and one of \$8,500. The former were in the shape of a request to the bank to make a written offer to sell for \$15,000, with right of acceptance or refusal for sixty or ninety days, in order to afford time to examine the limits. This the bank refused to do, on the ground that knowing nothing whatever themselves of the value of the limits the person to whom such an offer was made might in the end refuse to accept it, and they might in the meantime lose the opportunity of effecting the sale elsewhere.

This very clearly appears from their correspondence with Mr. J. C. Miller, a customer of theirs whose advice and assistance they sought in the matter.

On the 18th February, 1880, Mr. Campbell, the defendants' manager, wrote to Miller asking him to get from the Crown Lands Department "a plan sketch of our limits on the north shore. * * Also, as you are not a buyer, kindly give me your views as to probable value."

On the 20th February Campbell wrote again :

"You know infinitely more about those limits than I do. To tie them up as proposed for three months is objectionable, inasmuch as information would be one-sided, and perhaps not very reliable after all. Prentice spoke highly of them ; said he explored a great part of them himself, and would not part with them for double the cost could he retain them. I think they cost him \$25,000. We would be willing to throw off the odd amount. Supposing you make us your best offer, we have one now but not satisfactory."

Campbell wrote again on the 28th February, enclosing a letter from a Mr. Kerr asking for an offer of the limits at \$15,000, and sixty days time to examine and decide "Will you please write on Monday, if, in your opinion, it would be advisable to accept this offer. We declined one of the same nature before from Rathbun & Son. This

would be all right if we had a report also, but, as you will see, at the end of sixty days we are at the mercy of this party on account of his possessing all the information,"

To Kerr they wrote on the 31st May:

"Your favor of the 29th inst. is received. There is still the objection of tying up the sale to the exclusion of other possible buyers; at the prices we are offering the limits at, it seems to me there is but little risk in buying them, while there is a grand speculation in them, as they may be worth *five times the price we are asking* for them."

And at the trial Mr. Campbell gave the following evidence:

Q. As a matter of fact, you never took pains to ascertain the value of the limits? A. Excepting inquiry from Mr. Miller.

Q. You never sent any person to examine them? A. No.

Q. Do you know—or did you know anything about limits on the Georgian Bay or Lake Huron? A. I do not.

Q. Did it never occur to you that it would be proper for you to ascertain the value of these limits before you sold them? A. I thought it the duty of Mr. Prentice.

Q. Weren't you told by many people, and communicated with, that no person would be at the expense of sending up any one to ascertain the value of the limits, unless they had the refusal of it at a definite price? A. Yes; Rathbun said so, Miller said so, Champion said the same.

Q. Every man, in fact, that you dealt with said it would be impossible for him to buy without information—that they had no idea of the value of the timber limits; and no person would undertake to bear the expense of sending parties up there to examine and report on the value of the property unless a refusal was given of the property for a certain time at a fixed figure? A. Yes.

Q. They all agreed in that; didn't you think that was reasonable? A. Very reasonable on their side.

Miller's letters to the bank of the 23rd and 28th February point out to them very plainly what he thought they ought to do, and the disadvantageous position they occupied in trying to effect a sale without knowing anything of the property. This, indeed, their own letter of the 28th February to Miller shews that they were fully alive to. On the 23rd he writes them:

"I am really as ignorant of their value as you are, as that depends on how they are timbered. I was making enquiries this week from a gentleman well posted who insists that they are of little value. However, I never feel satisfied on that point until I have an actual examination by my own man."

And on the 28th February Miller again writes:

"Yours of the 25th inst., *re* Prentice limits is before me. I think the Rathbun offer very reasonable, as you are not likely to find any party who would incur the expense of an examination without having the refusal of the limits. There is just this danger of an examination, if the limits proved to be well timbered they would bring a much larger sum; of course if they proved of little value the party holding the refusal would decline to carry out the sale. It is all guess work until a thorough examination shall have been made by a competent wood-ranger. If you see fit to incur the expense, I will have a proper exploration made, and we will then be able to deal with the matter intelligibly."

The defendants having failed, as might perhaps have been expected from the method they had adopted, to sell the limits by private sale, determined, as they informed Miller on the 27th of July, to put them up for sale by auction, "as a matter of precaution, considering any interests that Prentice might claim in the limits, and thus settle any extravagant valuation he might place upon them, and take away grievances he might have against us for selling the limits at private sale."

Another letter may be referred to written on the 22nd of June, 1880, by Mr. Campbell to a Mr. Champion who had made an unconditional offer of \$8,500, a sum then sufficient to pay the bank's claim in full, as it further illustrates the defendants' misapprehension of their position with regard to the plaintiff, and their object or one of their objects in offering the property for sale by auction.

"Your favour of the 21st inst. is received. Owing to advice very recently received, that, notwithstanding we have a transfer of the limits unless we have a special acquittance from the party from whom we hold them, it is necessary we should *go through the form* of advertising

them and selling them by public auction; we are therefore taking steps to do this, and meantime cannot, I regret to say, accept an offer to sell them by private sale. We purpose selling them on 1st September, when you will have an opportunity to buy."

This offer, as I have said, was not communicated to the plaintiff, although it was most important to him that it should have been, and that he should at least have had the option of saying whether he would let the limits go for a sum sufficient to pay the bank.

The limits were advertised to be sold by auction on the 18th September. As regards the manner in which they were advertised, and the publicity given to the intended sale I do not see that the plaintiff has any reason to complain. To that extent he was made acquainted with what was being done and did not object; but on the contrary, furnished the defendants with a special and detailed description of the property for the purpose of the sale. As to this description, however, it is a matter for observation against the defendants that they neither made use of it themselves as being a statement made by the owner of the limits, which they might readily have done without pledging themselves to its accuracy, nor did they refer inquirers to the plaintiff or his son for the information which they might have given. At the auction there was only one bid of \$1,000, and the property was withdrawn at the reserve bid of \$9,000.

While the advertisement was running, the auctioneers wrote Campbell that they had several inquiries about the limits, but could not answer them until furnished with the necessary information. To this, Campbell replied that the limits had been made over to them by Prentice, but without information, and that they had not examined them, and had given a long notice of sale purposely to allow parties intending to buy to have them inspected for themselves.

Ultimately, after further correspondence with Miller and other persons, but without further inquiry as to value or

any communication with the plaintiff, the defendants on the 6th January, 1881, agreed to sell the whole of the limits to Miller for \$6,000, payable in one month.

The following evidence may be noticed for the purpose of shewing the effect that the absence of information as to the character and position of the limits had in preventing a sale.

John O'Brien, a witness for the defendants, one of the persons in whose hands they had placed the limits for sale, said he knew nothing about them, and could not succeed in finding any one who did. He had received no information from the bank beyond the number of the limits; the market was dull at that time for purchasing.

Q. You do not blame yourself for not succeeding? A. I could not have done otherwise.

Q. If you had known that these limits had somewhere in the neighborhood of 2,000,000 feet of timber on them; if you could have spoken of that with certainty, would you have had any difficulty in making a sale? A. I would not have had any difficulty in making a sale if the value was there.

Q. If you could have stated that there on the limits would be found 2,000,000 feet of fair average quality of timber, it would have been easy to get an offer? A. If you could guarantee that.

Q. If you could have made such a statement to them? A. I don't suppose they would take my statement, but most likely it would have enabled me to make a sale. The success would have been much better.

Theodore Hall, another witness for defendants, who had also been employed to sell the limits, said that a Mr. Champion Brown, with whom he had attempted to deal, would have nothing to do with them.

Q. Did he give any reasons for declining? A. It was because I could not really get hold of the desired information, the correspondence says.

Q. What was the desired information? A. If there had been extensive surveys made of the property it would have been valuable. People owning the limits had not incurred the expense of making surveys. We were not aware whether the lumber was poor or good. For some time

previous I had experience in the lumber business. I corresponded with timber dealers and speculators.

Q. How did they receive your proposal to sell these limits to them? A. They naturally said they did not know anything about the matter then. Then I mentioned one successful party who had bought limits. They did not make any offer; they did not seem disposed to purchase then.

Wm. Kerr, also the defendants' witness and who had also been endeavouring to sell the limits was, asked:

Q. If you had known what is now known about these limits, as to the quantity of timber on them, and the facilities for getting it out, would it have been easy to sell the limits at that time? A. I think that probably it would have been more easy to sell them at that time.

Q. They appear to be fairly good limits—limits with eighty million feet on some of them? A. Yes.

Q. A limit with 80,000,000 feet of lumber on it, near two streams—the water running through it—would be a good limit? A. It would be a good limit.

Q. What would you say timber standing on the land would be worth? A. One dollar a thousand over and above dues.

Q. What would it have been worth in the winter of 1880? A. Of course it depends a good deal on how the limits are situated.

Q. Supposing it to be worth a dollar a thousand now, what would it then have been worth—after 1880-1, would it have been worth as much at that time? A. I should say they would.

Q. Was there a period in the trade—during the depression—when limits were unsaleable—that you could not give them away, in fact? A. Oh, yes, ranging from 1875 up to near 1880.

Q. When was it trade commenced to revive? A. It commenced to revive about 1879-80.

Henry McKay a witness for the plaintiff, had also tried to sell them for the bank:

Q. You had no information from Mr. Campbell about them? A. No; no reliable information.

Q. And you had no information of any kind, in fact? A. No.

Q. And under such circumstances it is impossible for a broker to make a sale? A. Yes: quite.

Q. To enable you to deal with this as you ought between man and man, you ought to have had some information with regard to the character of the limit? A. The limits had a bad reputation.

Q. To deal with the limits as a piece of property to be disposed of on fair terms, you ought to have had a description of them, and what timber there was on them, and the facilities for getting the timber out? A. It would be better to know that. I have had a good deal to do with limits; it is very difficult to know what the value of a limit is—it depends on the quantity of timber, the quality of the timber, and the situation of the limit, and the facilities for getting the timber out; in the next place a man would have to go to considerable expense to explore 176 square miles of territory; and there might only be a few lots containing valuable timber.

A letter from J. D. Baer & Son of Detroit to Mr. Campbell, dated July 30, 1880, was put in by the defendants making inquiry about the limits, stating that they had been placed in their hands with imperfect information about the quantity and quality of the timber, that they had put out the limits in good faith, and were annoyed by numerous inquiries from prospective purchasers asking for information which they cannot give. "If you will give us the desired information as to quantity and quality of timber on these berths, and your positive price and terms of sale at 10c to us as commission, we feel sure that we can sell them, or a portion of them at once."

Mr. Campbell replied that the limits were advertised for sale by auction on the 18th September. "The limits *came to the bank from a party indebted to them*, and I have no reliable information about them. The date of sale is put so as to give intending buyers an opportunity of examining and posting themselves as to their worth. *Original holder of limits estimated them worth \$40,000.*"

Mr. Campbell's reason for not having a survey made was that it would cost money and would possibly damage the property. That the plaintiff was in debt to them, and had no other property or means of paying.

They paid the government \$324 for license fees accruing for the two years they held the limits. There was no

distinct evidence as to what a survey would cost; something more than \$200 and less than \$500.

Mr. Campbell was asked:

Q. And you were not going to be at a cost of \$500 to ascertain the value of the limits, and to realise a fair value for the property? Is that the meaning of it? A. I did not know but what a survey might damage the property.

Q. You were not willing to take the risk, in order to ascertain the true state of affairs, and realise the true value of the property? A. No.

Q. Under these circumstances, did you ever advise Mr. Prentice he ought to be at the expense, or that you would do it if he would furnish the money? A. I did not.

Q. Did you afford him any opportunity at all of doing what you neglected to do? A. I did not.

Q. Do you remember Mr. Miller informing you—suggesting you should do so—either have them examined or get Prentice to have them examined? A. I think he made reference to that in some of the correspondence.

Q. On the 28th of February Mr. Miller writes to you that if you see fit to incur the expense he will have a proper exploration made, and you will then be able to deal with the matter intelligently. What answer did you make to that? Do you remember? A. I don't know; I do not remember whether I replied to it at all or not.

I am of opinion upon a careful consideration of all the evidence that it fully supports the finding at the trial that the defendants omitted to use due care and diligence, and were guilty of negligence in selling this property.

The particular negligence for which, under the circumstances, I think them answerable, was, the omission to inform themselves by independent examination of the limits or by other means, of their real character and probable value.

The necessity for this was apparent to them from the outset, but they were unwilling to incur the expense, and feared the result of a survey might be unfavorable. I do not mean to say that they would have been, under all circumstances, bound to incur any expense, or advance money on the plaintiff's account for such a purpose, but their duty must be measured by the position in which they had.

chosen to place themselves with regard to him. Their agreement with him, and the right and power he had conferred upon them was, to sell the limits. As soon as they attempted to do so they found that no one would purchase without an opportunity of examining them, nor incur the expense of an examination without a definite offer for the time necessary to make it. Miller tells them that the value of the limits depends upon how they are timbered, and that he never felt satisfied on that point without an actual examination by his own man. And again, that it is all guess-work until a thorough examination has been made by a competent wood-ranger, and offers, if they will incur the expense, to have a proper exploration made, so as to deal with the matter intelligibly.

Of this proposal no notice was taken, nor from the day they acquired them till the day they sold them was any attempt made by the defendants to ascertain from an independent source whether the real character of the limits was otherwise than the plaintiff had told them it was.

They never communicated to him any of the offers they had received, or the repeated requests for information about the limits, or Miller's advice to have them examined, or his subsequent unfavorable report. With the single exception of giving him notice of the intended sale by auction, they undertook to dispose of the limits without notice to him of what was being done by them, and as if they were absolutely their own property, to do as they pleased with.

I think it was their duty to have given the plaintiff an opportunity of saying whether he would incur the expense of, or would procure an examination of the limits, or whether he would authorize them to make such offers as Rathbun and others asked for: or, if they had determined to sell without reference to him, then that they should themselves have done what was reasonably necessary in order to enable them, as Miller told them, to deal intelligibly with the property.

The course they adopted of hawking it about, as I may call it, among brokers and commission agents, telling applicants that they must obtain information at their own expense, without even the assurance of being able to purchase the property after all, was distinctly calculated to damp its sale, and damage its reputation, and one which would never have been adopted by a prudent owner possessed of any knowledge of what he was selling.

A good deal was said in the argument as to a letter of the 7th of May, 1880, from Campbell to the plaintiff, saying that if the amount due was not paid within one month from date the bank would sell the limits for the best price they could get. The plaintiff denied that he ever received this letter, and I confess that I see no reason to disbelieve him. But if he had received it, it would make no difference in my view of the defendant's responsibility, having regard to the ground on which I think it rests.

It is noticeable, moreover, that this letter suppresses the propositions of Rathbun & Co. and William Kerr, and therefore contains something very like a distinct misstatement in saying that the defendant had not been able to get an offer equal to the amount the plaintiff owed them.

As to the damages. The plaintiff's description of the limits was more than borne out. It was proved, and the defendants offered no evidence to the contrary, that three of them were well timbered with pine of good quality, and that all of them had ample facilities, from their position, and the existence of floatable streams thereon, for getting out the timber.

W. W. Sullivan and Peter McIntosh had made an examination and report upon the limits in May, 1883, after action brought. They agreed in saying that Berth 107 had about 27,000,000 feet of boards of red and white pine, berth 119 about 80,000,000 feet of the same of good quality, berth 128 about 5,000,000 feet of the same and berths 136 and 137 each about 85,000,000 feet of the same.

I do not think it necessary to refer in detail to the evidence of several witnesses who spoke of the value of the limits thus timbered. The lowest and perhaps the most practical figures having regard to the state of the timber trade in 1880, is that of Mr. John B. Smith, who said they were worth from \$200 to \$250 per square mile.

In March 1881, Miller sold three of the limits, Nos. 128, 136, and 137, to Messrs. Lockie & Cook for \$19,000, and in June, 1882, they were resold to a lumber company for \$106,000. The parties to this sale satisfied themselves that there were upwards of 100,000,000 feet on 136 and 137 alone not taking 128 into account at all.

It was shewn that property of this kind had been increasing in value and coming into demand during the year 1880, and the defendant's letter of the 7th May above alluded to and their letter to C. P. Champion of 29th September, 1880, shews that they were aware of it.

The price obtained by Miller in March, 1881, for three of the five limits makes it difficult to say that in awarding \$19,634.38 damages the learned judge actually over-estimated the value of the whole in the previous January, making every allowance for a steady rise in value in the meantime. I do not know how the amount was arrived at with so much apparent exactness, but I presume that \$25,000 has been taken in round numbers as the general value of the whole, and as being the sum for which the plaintiff acquired the limits in the first instance, and that the price for which the defendants sold them has then been deducted. How the odd sum of \$634.38 is made up we are not informed, nor can I quite make it out; probably it was by disallowing some charges for interest, &c., in the defendants' account.

I do not think the plaintiff could have complained if the learned judge had assessed the damages at a much smaller sum, as it is pretty clear he expected the property to be "sold cheap," and would have been quite content to let it go at \$15,000 or \$20,000 or less, even had he known a good deal more of its real character than he

did. His cross-appeal as to the damages should therefore be dismissed.

On the question whether the defendants' appeal should be dismissed or a new trial granted, I do not doubt the power of the court to grant a new trial in a case which has been tried by a judge without a jury, nor do I, as at present advised, think that the conditions under which such a course should be taken are so limited or restricted as I believe some of the other members of the court think they are. But in the present case the defendants have not themselves suggested that a new trial would be of any use to them, or that they have any other evidence to offer.

There are, no doubt, circumstances which one would like to have seen explained if capable of explanation, notably the defendants' conduct in not informing the plaintiff—it may be said in concealing from him—for several months the fact of the sale to Miller. But as the case is presented their liability does not appear to me to hinge upon any of these circumstances, which, in fact, do not bear upon the question of their negligence and its consequences. As to that the plaintiff's case is, I think, fully proved. Damages were awarded on a more liberal scale than I should have been inclined to give, and I would not have much compunction in concurring with other members of the court in substantially reducing them, but, considering the evidence and the nature of the damages, I think we ought not to grant a new trial on that ground.

HAGARTY, C. J. O.—My learned brothers have come to the conclusion that the verdict and judgment of the court should be affirmed. I dissent from this opinion to this extent; I am not prepared to hold that the defendants were entitled to judgment, but after the best consideration in my power I think that the case should be submitted to another trial.

I cannot help believing that a further investigation is proper under the present circumstances. The learned judge who tried the case without a jury has not given us

anything beyond his findings of fact. It would have been to me, at least, a very great assistance if I had the advantage of reading his view of the evidence as presented to him on the various branches of the case. He finds the transaction as to the lands to have been in the nature of a mortgage, with power of sale, and that in exercising such power the defendants did not use such care and prudence as persons of reasonable prudence would have used, and were guilty of negligence, and he assessed plaintiff's damages at nearly \$20,000.

The plaintiff has thus in effect recovered \$25,000 as \$6,000 produced by the sale had been applied towards payment of his debt to the bank. There was a very important letter from the bank to the plaintiff of 7th May, 1880, in which they speak of selling for the best price they can get, if their claim was not paid within a month.

The plaintiff denies its receipt. For myself I should have thought on the evidence that it had been received. I would have been glad to have this point decided by the learned judge or jury. I have not been able to see any sufficient evidence of want of reasonable care up to the offering of the limits for sale at auction, in Toronto, in September, 1880. I am wholly unable to understand the apathy of the plaintiff, and his omissions in any way to help his creditors to effect a good sale has surprised me very much. I am not prepared to agree that the creditors were bound to increase his debt by some hundreds of dollars in having a regular inspection of these limits. The provisions of our Ontario Act of 1879, 42 Vict. ch 20, for holding powers of sale to be considered as inserted in mortgages by deed, do not apply to this case.

There is no doubt of the debtor's full assent to the attempt to sell by auction, and his full assent to a private sale provided, as he contends, a reasonable price had been obtained.

I find it very hard to understand rightly the nature of the dealings by the bank with the property between the auction sale and the sale to Miller, January 6th, 1881.

On February 8th, plaintiff wrote asking information as to the auction sale. 12th February the letter is acknowledged by the manager merely saying that no bid had been made, and consequently no sale.

It seems impossible to understand how such a letter could have been written without informing the plaintiff that over a month before his limits had been sold to Miller for \$6000.

No notice was taken of this most extraordinary circumstance at the trial, and it was first noticed in the argument before us.

There is apparently a letter from plaintiff missing.

Mr. Campbell writes, 31st of May, 1879, "We have your letter of 10th inst. offering to transfer certain timber limits upon being released from your debt to the bank."

The transfer was effected the following month. It is unfortunate that this letter of plaintiff's is not forthcoming.

There is also a letter from the plaintiff, 20th August, 1881, after receiving the bank's account, shewing him still in their debt, speaking of the sale, and adds: "You wrote me once that if I would pay 50c. on the dollar you would let me clear, which I trust you will." There is no charge of any claim for selling too low.

I think with the case in its present position before us, it is eminently one calling for our directions that it should be tried again, as we have, I consider, unquestionable right so to direct.

The amount is large, and the action of an unusual and peculiar character, and as already stated we are without any statement of the reasons on which the findings at the trial were based.

I cannot join in upholding the verdict for this large amount without further inquiry, as I cannot divest myself, as a judge of fact, of the feeling that the plaintiff is recovering many thousands of dollars more than a price at which he would have willingly joined the bank in selling these limits.

I do not pretend to foresee whether a new trial might or might not strengthen the defence to this claim. A further inquiry would, at all events, remove some doubts from my mind which prevent my present acquiescence in the judgment just delivered by my learned brothers.

Appeal dismissed, with costs,
HAGARTY, C. J. O., *dissenting.*

VINEBERG V. GRAND TRUNK RAILWAY COMPANY.

Railway company—Common carriers—Bailees—Warehousemen—Liability for loss of baggage.

"It is the duty of a railway company to have baggage ready for delivery on the platform at the usual place of delivery, until the owner in the exercise of due diligence can call and receive it; and it is the owner's duty to call for and receive it within a reasonable time." Therefore, where a passenger on arriving at his destination deliberately refrained from applying for his baggage on being told by his cabman that he could not conveniently take it, and on sending for it on the following morning, one of three trunks could not be found:

Held, in an action to recover the value of the trunk and the wearing apparel, it was said to contain, that the liability of the railway company as common carriers had ceased, and [in this reversing the judgment of the Court below] a nonsuit was ordered to be entered.

The only claim (if any) which the plaintiff, under the circumstances, had against the company, was as warehousemen or bailees.

THIS was an action brought by Aaron Vineberg in the County Court of Stormont, Dundas, and Glengarry, against the Grand Trunk Railway Company of Canada, seeking to recover from the defendants, as common carriers, \$200 for damages by reason of the loss of a trunk alleged to have contained certain goods and chattels of the plaintiff, and which occurred in the manner hereinafter appearing.

The case came on for hearing before His Honor Judge Pringle, on the 12th June, 1885, when the plaintiff was examined on his own behalf, and in the course of his evidence stated that he was a pedlar at the time of the loss (9th January, 1884), and in answer to a request that he would relate to the Court and jury the circumstances connected with the loss of the trunk in question, said:

"I had three trunks when I started after New Year. I came to Morrisburgh, and started for Iroquois driving. I took a horse. It was very stormy, and there was very deep snow. I met young Fraid coming into town. He asked me where I was going, and I asked where he was going, and he said he was going to Morrisburgh. I said, I do not intend to peddle any more, Albert. If you will do me the favour of taking this trunk to Morrisburgh, I guess I will go home. If you will check it to Cornwall I guess I will go home on Wednesday or Thursday; I will go home to Cornwall, I said, (that is where my brother is living,) and if you pass me I can get the check and get the trunk in Cornwall. So I left him and went to Iroquois. I went off the first night, and in a couple of days went over and stopped one night at a farmer's, and when at Iroquois I stopped at the Grand Trunk Hotel. The station master went down with me, (it was near the station) and we checked about five o'clock or four o'clock, and the train was very late. I could not say how late, but the train was very late, I guess, when we started. It was night, when he, young Fraid, handed to me the check. When I came to Cornwall, I got a little shawl to turn over my neck, and when I got there the man who drives the team, Jessmer, he took me for my brother. He said, "Will you drive down? I said all right, I will drive down." So looking out near the baggage, I did not see any one, and it was very stormy. I went over and there was no one. So he said, 'Drive down,' he said, 'it is impossible to get it to-night.' I was looking, and he said, 'You will get it to-morrow morning if you cannot get it to-night.' I tried that night but could not get it."

Q. Did you see any baggageman round there that night, with a band on his hat? A. I know this gentleman with black whiskers. He has checked me over a hundred times. I got home, and in the morning when I went out of my brother's place, I met Rookey, his brother-in-law, and I said, "Mr. Rookey, go down to the depot and get these three trunks," and I handed him the checks, and when he came back he had only two.

Q. Is this the check of the missing trunk now produced, numbered twenty-one thousand eight hundred and eleven. (21,811.) A. Yes.

Q. You got no trunk for this check? A. Not for this. I got the other two.

The learned Judge, at the suggestion of counsel on both sides, submitted several questions in writing (eighteen in all) to the jury, who, after an hour's consultation, returned with written answers to all, save the 12th, which was: "Was any of the plaintiff's trunks stolen after their arrival at Cornwall, if so, from what place was it stolen or taken, and at what time"—and to this no answer was given; and the jury returned a verdict for the plaintiff for the value of the wearing apparel and trunk, \$120; and thereupon the Court directed judgment to be entered for the plaintiff for that sum and costs.

The defendants subsequently obtained an order nisi to set this verdict and judgment aside, which on argument his honor refused to make absolute, observing in the course of his judgment in doing so that

"On the defendants' part, there is the evidence that only three trunks came down to Cornwall station on the night of the 9th, one of which belonged to a young lady—that no trunk was checked from Morrisburgh to Cornwall on that day; and that on the 7th two trunks were checked for Cornwall; that on the 8th, seven were checked from Morrisburgh. That the three trunks which arrived on the night of the 9th were taken to the baggage room; that one was delivered to Jessmer, the cabman; that the plaintiff took the checks of the other two and gave them to one Cassils, who was acting baggage man; that plaintiff then said the carter could not take down the trunks that night, and they had to be left till morning, and took back three checks from Cassils instead of the two that belonged to him; that plaintiff gave different statements as to the place where his third trunk was checked, and as to the contents of the one that was lost.

"The evidence of plaintiff having taken the checks off his trunks in the baggage-room was given by the station master. Plaintiff contradicted it positively. Cassils, who acted as baggage man, was not called by defendants as he could not be found, and the evidence of Jessmer is rather corroborative of plaintiff's statement.

"Upon this evidence, the case was left to the jury. They were told that the defendants' duty as common carriers was fulfilled when they placed the baggage on the platform; that if baggage is not claimed as soon as the train arrives, it is placed in the baggage room, and after that the duty of the defendants is to take the same care of it as of their own property, and that if it is stolen, they are not liable, unless the loss is caused by gross negligence on their part. See *Bowie v. The Buffalo, Brantford and Goderich R. W. Co.*, 7 C. P. 191; *Hall v. Grand Trunk R. W. Co.*, 34 U. C. R. 517, *Inman v. The Buffalo and Lake Huron R. W. Co.*, 7 C. P. 325. * *

"The facts were left to them in a series of questions which were agreed to by the counsel on both sides. Upon considering all the answers given to the questions. I could come to no other conclusion than that the jury had decided in favor of the plaintiff, and that the judgment must be for him.

"Had the jury found that the plaintiff had taken his checks from his trunks in the baggage room, the case would have been similar to that of *Penton v. Grand Trunk R. W. Co.*, 28 U. C. R. 307, and the judgment must have been for the defendants.

"The evidence was conflicting: if the jury had found for the defendants, I could not have disturbed the verdict, and I do not see sufficient ground for disturbing that for the plaintiff, I therefore refuse to make absolute the order nisi."

The defendants thereupon appealed to this Court, and the appeal came on for hearing on the 8th and 9th of March, 1886.*

Wallace Nesbitt, for the appellants.

Cattanach, for the respondent.

April 20, 1886. HAGARTY, C. J. O.—I find the greatest difficulty in understanding the case made out by the plaintiff in his account of the alleged loss.

As I understand his statements, it appears that he had three trunks; that he gave one of them to one Fraid at Morrisburgh, to be sent on to Cornwall; that he retained the other two, and went about on his peddling business for at least a couple of days, and then, at Iroquois, on the evening of January 9th plaintiff took the train for Cornwall, checking the two trunks he had with him. It appears that Fraid, the same day or evening that he got the trunk from plaintiff, took it to the Morrisburgh station and checked it there in the ordinary way for Cornwall.

Certainly, two or more likely three days after so doing, Fraid met the plaintiff at the Morrisburgh station on his way to Cornwall and handed him the Morrisburgh check. Plaintiff proceeded to Cornwall with the three checks. It was dark and stormy when he arrived, and he swears he did not that evening see any of his baggage, nor did he look for it.

The next morning, he sent down with the three checks one Rookey, a carter. This man says he could only get two trunks on these checks. He says "they were those common trunks that you have boots and shoes in—blue tin—like trunks with goods."

The plaintiff says, in answer to a question: "I suppose this trunk put on at Morrisburgh was pretty heavy too?" Answer: "I guess so. I have got two locks on it, with a leather cover, but you have only one key to open it."

In his examination in chief he says the trunk that was lost has two locks, and he then gave a detailed account of

Present.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

the contents—a large quantity of his wearing apparel to \$114, and \$6 for the trunk. He also states it contained some quilts and goods.

On cross-examination :

Q. I want to find out what was in this trunk you gave to Fraid? A. Goods; quilts.

Q. Nothing else? A. Nothing but quilts.

Q. Nothing but personal baggage? A. No. No personal baggage.

Q. Could you tell us what was in the other trunk? A. I cannot tell what was in it.

Q. Would you swear there was no personal baggage? A. No more than undershirts.

Q. To wear? A. Not to wear. No.

These questions and answers are not explained by the preceding or subsequent context. Plaintiff produced the check for which he got no trunk.

The two checks admitted by defendants to be from Iroquois to Cornwall, were numbered 21,811 and 10,799 in the baggage man's books.

A check also numbered 21,811, was produced by defendants, the agent said he received it from one Cassils, in the defendants' employ at the time of the loss, but not so received till about a month after. Cassils saying he had got it from plaintiff. Cassils could not be found. He had long left the company's service soon after the loss. Plaintiff denies all knowledge of Cassils.

The duplicate of this last check is produced by plaintiff.

The Morrisburgh baggage man produced his book, shewing that for that train, or in fact for that day, no baggage for Cornwall was received.

He also proved that on the 7th or 8th no numbers like those in question on plaintiff's checks were shipped at Morrisburgh.

On the defence the plaintiff's statements were contradicted most directly.

It was sworn that three pieces of baggage came from that train that evening, one of which was claimed for a Miss Doran, and the agent Horseman swore he saw

the plaintiff take the checks off the other two, and hand them to Cassils, who handed these with another check to the plaintiff, which may have been a check to Miss Doran's trunk, which the carter took that evening—having got her check therefor; and that the plaintiff said they could not be taken, and he must leave them till morning. Evidence was given of the most contradictory statements by plaintiff as to his loss, and where he had shipped the trunks, and as to the contents.

I have seldom perused evidence more unsatisfactory.

The jury answered questions nearly all in favor of the plaintiff—that two trunks were shipped at Iroquois and one at Morrisburgh—no evidence when: that the two checked at Iroquois did arrive at Cornwall. So did that checked at Morrisburgh, &c. No questions out of the eighteen asked, referred to the point as to which trunk contained plaintiff's personal baggage.

The learned Judge says in his charge, "I think there is no question whatever but that he delivered at Iroquois the trunk which bore the check 21,811, this check which is said to have been upon the trunk that is said to have been lost."

The evidence of defendants' baggage-man would shew that 21,811 and 10,799 were the checks on the two trunks from Iroquois.

The learned Judge also says: "Vineberg states * * that one was checked at Morrisburgh, and that Fraid brought him the duplicate; being the check 21,811, which was one of the duplicates which Vineberg himself got at Iroquois."

In view of the evidence and the nature of the defence set up, it may have had an unfavourable effect on the jury for the learned Judge to have assumed as proved, the matters in the first citation from his charge. It is to be regretted that more care was not taken at the trial to prove the character and description of each trunk as to blue tin and leather cover, &c.

If the case rested solely on these questions of fact, I think we should not hesitate to direct that there should be a

new trial—not on the mere question of weight of evidence, but for the better understanding of their true nature.

We have now to dispose of the legal objection on the motion for nonsuit, which was in substance that the contract of carriage was fulfilled and the goods delivered at the station at Cornwall.

The evidence of the plaintiff is, at least, on this question unmistakable, and the findings of the jury are to the same effect. He swears that he did not see the trunks when he arrived at the station; that he did not personally ask any one for them; that he went away with the omnibus, deciding to leave them there that night and send for them in the morning.

The jury find that the two trunks did arrive at Cornwall station.

That the trunk checked at Morrisburgh was carried to and put out at Cornwall station.

That two trunks were at Cornwall station ready to be delivered to plaintiff when he called for them.

That he did not apply for his trunks on the arrival of the train.

That he did apply next morning, but only got two trunks.

That the plaintiff had not a reasonable time to apply for the trunks on the evening of the 9th after the arrival of the train.

That he did apply for them next morning.

I think these two last findings—the facts being undisputed—cannot add to the defendants' liability. If the voluntary delay of about 12 hours in not claiming delivery of baggage be in itself a failure of duty on the plaintiff's part to be ready to receive his baggage on arrival, we cannot hold that the finding of the jury as to his being in a reasonable time can make the carriers liable as such.

This action is against the defendants solely as common carriers.

When defendants put the goods on the platform ready to be delivered to the plaintiff, and he having the fullest

opportunity of claiming and receiving them, but elects to leave them unclaimed till next day, it would seem that their liability as carriers is at an end, and that assuming they put the goods into a baggage room or warehouse they could not be under any higher liability than that of warehousemen.

In *Penton v. Grand Trunk Railway*, 28 U.C.R. 367, (1871) it appeared that the plaintiff was a passenger to Seaforth with two checked trunks, and they were put on the platform, and he assisted the defendants' servant to put them in the baggage room, and went up in an omnibus to an hotel; this being about 3 p. m. About 8 that evening he sent for them, but one was gone. The evidence went to shew that it was stolen.

The judgment of the court was delivered by Wilson, J., in favor of the defendants. He says: "The plaintiff was entitled to a reasonable time after the goods were put upon the platform to call for and take them away. There is no room for doubting but that he had this full and ample reasonable time for the purpose which takes this case from the effect of some other of the authorities cited for plaintiff."

Hall v. Grand Trunk Railway, 34 U. C. R. 517 may be referred to.

In *Shepherd v. Bristol and Exeter Railway*, L. R. 3 Ex. 189, Bramwell, B., says: "The plaintiff complains of a breach of duty or contract by defendants as carriers. This is the form and substance of the complaint. The question is not whether he has some cause of complaint against some company or person, but whether he has a cause of complaint against defendants as carriers. The defendants say he has not, and that nothing more remained to be done by them under their contract as carriers when the alleged damage occurred. This is the question, and it seems to me better to put it thus," &c.: *Patscheider v. Great Western R. W. Co.*, 3 Ex. D. 153.

It is laid down that it is the company's duty when the passengers' baggage reaches its destination to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due dili-

gence, can receive it, and the liability does not cease until a reasonable time has been allowed to the owner to do so.

The article lost was delivered, as plaintiff saw, on the platform at Paddington with her other luggage; the hotel adjoins the station. She went to the porter of the hotel to take the luggage to the hotel, but when she subsequently arrived there she could not find the box among the luggage which the porter brought. There was conflicting evidence with respect to the box after being taken from the train and placed on the platform. The jury found there had been no delivery to plaintiff, and no negligence by her.

The court held that the box must be placed on the platform until the passenger has the opportunity of calling for and receiving it, and the jury were justified in holding there was no delivery.

The rule in *Redfield on Carriers* is quoted approvingly: "It is the duty of railway companies to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call and receive it, and it is the owner's duty to call for and receive it within a reasonable time."

In *Hodkinson v. London and Northwestern Company*, 14 Q. B. D. 228, the plaintiff arrived at the station with two boxes, which were taken from the van by defendants' porter. He asked should he call a cab. She said she would walk to her destination, and would leave her luggage at the station and send for it. The porter said "All right; I will put them on one side, and take care of them." This was at 4:25 P. M. At about 6 P. M. the same evening she returned for her box.

The porter said he had given one of them to a woman who he thought was the owner.

It was never recovered.

In the County Court the judge held that the plaintiff had never resumed possession of this box, and that it was all the time in the custody of the defendants.

On appeal, Lord Coleridge, C. J., held that when the plaintiff's luggage was taken from the van and placed at her disposal the company's responsibility was at an end. The plaintiff, when she quitted the station, left her luggage in the custody of the porter, who had then ceased to be acting as the company's agent. He adds that *Patscheider v. Great Western R. W. Co.* is clearly distinguishable, there the plaintiff had no opportunity of taking possession of her box.

Many American authorities support this view.

I am placing the case wholly on the plaintiff's testimony. If the defendants' evidence is to be believed it would also be fatal to the plaintiff, as it is sworn that he took the checks off the baggage himself.

We must treat this case solely as against common carriers. As Bramwell, B., remarked, if the plaintiff have any other claim against the company or any one else, he should pursue it. He should give evidence leading to the conclusion that the defendants were liable to him in their narrower responsibility as warehousemen or bailees of these goods after he had elected to leave them at the station for eleven or twelve hours.

If the trunk lost had really been the Morrisburgh trunk, which he swears contained merchandise, he could not recover for it in this action.

We must certainly infer from the evidence that this Morrisburgh trunk in the nature of things must have been one or two or three days at Cornwall station before plaintiff arrived there.

It appears to me the appeal must be allowed, with costs ; and the rule for nonsuit in the court below be made absolute, with costs.

BURTON, J.A.—The difficulty which I at first felt in concurring in a nonsuit, arose from the tenth finding of the jury, that the plaintiff had not a reasonable time after the arrival of the train at Cornwall in the evening of the arrival to apply for his trunks, but upon a careful exami-

nation of the evidence, I am of opinion that there was no evidence upon which a jury could reasonably come to such a conclusion.

I think the mere delivery upon the platform is not of itself sufficient to absolve the defendants from responsibility as carriers, but it must still be considered as under their control as carriers until the passenger has an opportunity of claiming it, and if it had been shewn that the officer of the company had left the station without affording the plaintiff such an opportunity, their obligation as carriers would have remained undischarged, until such opportunity had been afforded.

The two boxes checked at Iroquois, of which that *now* claimed by the plaintiff was one, the jury have found were delivered at the Cornwall station; the plaintiff, instead of going forward to receive delivery voluntarily refrained from doing so, on hearing from the cabman that he could not conveniently take his baggage, as he had one trunk already, and he thereupon deliberately decided to send down for it in the morning. It is not necessary to consider whether the company might be liable as warehousemen under such circumstances; but it is sufficient to say that the plaintiff has not made out a case for charging them as carriers. The other finding of the jury that the sending down in the morning for the trunks, was within a reasonable time was, under the circumstances, purely a matter of law which ought not to have been submitted to the jury at all.

I agree, therefore, in holding that the appeal should be allowed, and a nonsuit entered.

PATTERSON and OSLER, JJ.A., concurred

Appeal allowed, with costs.

IN RE WALDIE AND THE CORPORATION OF THE VILLAGE OF
BURLINGTON.

Order amending plan by closing street—Municipal Institutions Act, R. S. O. ch. 174, secs. 525, 527—Registry Act, R. S. O. ch. 111, secs. 52-53—By-law opening street—Quashing by-law.

On the 13th of November, 1883, the judge of the County Court of the county of Halton, in which county the lands hereinafter mentioned were situate, after hearing the several parties interested in the said lands and the streets thereon made an order altering and amending the plan thereof by closing up and declaring closed certain streets and parts of streets: Notwithstanding such order the council of the defendant municipality on the 5th of December, 1883, passed a by-law accepting and declaring open some streets so closed, and authorizing and directing the road commissioner to remove all fences and obstructions therefrom; whereupon the plaintiff moved for and obtained an order nisi to quash such by-law, which upon argument before ROSE, J., (in single Court) was made absolute with costs. On appeal to this Court that order was affirmed, and the appeal dismissed, with costs.

Sections 82, 83, 84, 85 of the Registry Act, R. S. O. 111, and sections 525, 527 of the Municipal Institutions Act considered.

Semble, that an appeal lies from the order of the Judge of the County Court under the Registry Act, altering or amending a plan.

THIS was an appeal by the defendants from the judgment of ROSE, J., reported 7 O. R. 192, where and in the judgment of this court, the facts giving rise to the proceedings are fully stated, and came on to be heard before this court on the 8th of March, 1886.*

Lash, Q.C., and *Carscallen*, for the appellants.

Osler, Q. C., and *Laidlaw*, Q.C., for the respondent.

April 20, 1886. The judgment of the court was delivered by

OSLER, J. A.—This is an appeal from the judgment of ROSE, J., quashing certain parts of by law No. 60 of the corporation of the village of Burlington, passed on the 5th December, 1883, entituled "By-law to accept and open certain streets, and to accept an acre of land in the east end of Burlington, formerly Port Nelson."

* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

The order nisi in the Court below was confined to the following portions of the by-law :

"Whereas certain *unopened streets* known as Port street, a portion of Green street and Front street, in this village, *are now in the possession of John Waldie, Esq.*

And whereas it is now deemed in the public interest *that the said streets should be opened for use.*

And whereas a petition has been presented to this Council, signed by William Little and twenty-three others, owners and residents in the locality of said streets, whose property is depreciated in value by reason of the streets being closed, and who ask that the same be immediately opened for public use.

And whereas the legal notice has been given, pursuant to sec. 506, ch. 174, R. S. O., to the parties in possession of said streets, and no good and sufficient cause has been shewn why the streets should not be opened.

It is therefore hereby enacted by the corporation of the Village of Burlington, under and by virtue of the authority contained in section 509, ss. 1, ch. 174, R. S. O., and in accordance therewith.

2. That Port street, from Water street to the waters of Lake Ontario, is hereby *accepted and declared open to the public use.*

3. That Front street, from Green street to Market street, is hereby *accepted, and declared open to the public use.*

6. That ten days after the passing of this by-law the road commissioner is hereby empowered and instructed to remove all fences and other obstructions placed across the above-mentioned streets, and take possession of the same on behalf of this corporation.

Passed in council this 5th day of December, 1883."

The street called Front street, in clause three, was Water street.

The learned judge quashed the by-law on the ground that it had been passed in defiance of and in opposition to an order made by the judge of the County Court of the county of Halton on the 13th November, 1883, amending the registered plan on which the said streets were laid down by closing those portions of them which the council of the corporation thus afterwards attempted by the by-law to accept and declare open.

The material facts relating to this order are briefly these :

Philo D. Bates was formerly the owner in fee of part of lot No. 16 in the 4th concession south of Dundas street, township of Nelson, now forming part of the village of

Burlington. He caused a plan of it to be made by one James Cleaver, subdividing it into lots, on which plan the streets in question are marked out.

Lots were, from time to time, sold to various persons according to this plan.

The original plan made by Cleaver was never registered, and was said to have been lost, but on the 31st January, 1868, several years before the incorporation of the appellants, a copy of it was prepared by one Thomas A. Blyth, P. L. S., for the municipality of the township of Nelson. This plan was registered by the township on the 16th March, 1869, and is known as the Bates' Plan or Bates' Survey.

The respondent was the owner in fee of a block of land composed of lots adjoining those parts of the streets marked on the plan which were closed by the Judge's order, but which the by-law purported to accept and declare open, and also of the land over which such streets were so marked out, by title derived under Bates or his heirs. This land he had always used for farming purposes. There was no building on it. The places marked on the plan for the streets had not been laid out or marked on the ground as streets, or used as such, but were always used with other land without regard to the plan.

Under these circumstances the respondent made an application to the judge of the County Court pursuant to R. S. O. ch. 111, sec. 84, to amend the plan by closing those parts of the streets which were laid down thereon over the land owned by him.

This application was opposed by the appellants, who were represented by counsel, and also by several lot owners. On the hearing it was agreed that the plan of the 31st July, 1868 "was to be dealt with for the purpose of the application as the original plan made by Philo D. Bates."

Evidence was taken as to the respondents' title to the lots and streets, and the propriety of amending the plan. The learned judge, in the presence of counsel for the par-

ties, viewed the locality, and proof was given to his satisfaction (as he reported to the court below) that notice of the application had been given to all parties interested, and that they had either consented to the amendment or were represented before him.

He, thereupon, on the 13th of November made the order referred to, which is in the following terms :

"Upon the application of the said John Waldie, * * and upon hearing the evidence offered before me in favor of and in opposition to the said application, and upon a view of the property and streets in question in presence of counsel for the said parties, and upon hearing what was alleged by counsel for the said parties, and counsel aforesaid consenting that the said plan shall for the purposes of this application be dealt with as if it were the original plan of Philo D. Bates. And it appearing to me that it is fit and just to order the alteration of the said plan in the manner hereinafter mentioned :

"I, the said Thomas Miller, Judge of the County Court of the county of Halton, in which the lands lie, do order that the said plan filed as aforesaid be altered and amended by closing street marked Water street in said plan, running between the limit between lots sixteen and seventeen in the fourth concession of the township of Nelson, south of Dundas street ; and the street called Market street, excepting that portion thereof occupied by the street referred to in the argument before me as Green street (which is to remain open throughout), and by closing street marked Port street on said plan running between street marked Water street on said plan and the waters of Lake Ontario. And the said streets and portion of street are accordingly closed by me under and by virtue of section No. 84 of the Registry Act."

Notwithstanding the order, the council a few days afterwards passed the by-law complained of, and it was quashed by Mr. Justice Rose for the reason already mentioned.

In making the order to amend the plan the learned judge of the County Court acted under the authority, conferred upon him by section 84 of the Registry Act R.S.O.ch.111, which we had recently to consider on another point in the case of *Re Chisholm and Oakville*, 12 A. R. 225.

That section provides—

"In no case shall any plan or survey, though filed and registered, be binding on the person so filing and registering the same, or upon any other person, unless a sale has been made according to such plan or survey, and in all cases amendments or alterations of any such plan or survey may be ordered to be made at the instance of the person filing or

registering the same, or his assigns, by the Court of Queen's Bench or Common Pleas, or by the Court of Chancery or by any judge of the said courts, or by the judge of the County Court of the county in which the lands lie, if, upon application for the purpose duly made, and upon hearing all parties concerned, it be thought fit and just so to order, and upon such terms and conditions as to costs and otherwise as may be deemed expedient."

The contention of the appellants is, that the order was void, and therefore could not affect their right to pass the by-law: that although the respondent derived title under Bates, he was not a person at whose instance the plan could be amended, because it not having been actually registered by Bates, but by the council, he was not an assign of the person who registered the plan within the meaning of the 84th section.

It may be conceded that if the judge had no authority to amend the plan, and there were no means of appealing from his decision, the order would not stand in the way of the council to pass any by-law they were otherwise competent to pass.

But if the judge had jurisdiction, or an appeal lay, they cannot get rid of the order by a side-wind, and attack it under pretence of supporting a by-law passed in defiance of it.

The first question is as to the right of the municipality of Nelson to file the plan, and the effect of such filing upon the rights of the owner and his assigns.

In the reasons of appeal it is stated that the plan was filed under the section of the former Registry Act, 31 Vict. ch. 20 (O.), (to which section 85 of the Revised Act corresponds), and it was contended that section 84 confers no authority upon the county judge to amend a plan so filed. There may be a difficulty in applying the section in such a case, but it does not arise here, the argument being based upon a misapprehension of the facts.

Section 85 applies where an incorporated town or village, or an unincorporated village, comprises different parcels of land owned at the original division thereof by different persons, and which were not *jointly surveyed*, and one

entire plan of such survey made and filed in accordance with the 82nd section of the act, the provisions of which I shall hereafter refer to. There the municipality of the town or village, or of the township, as the case may be, is required on the written request of the inspector of registry offices, or of any person interested, to have a plan of *the town or village* made and registered, the cost of which is to be defrayed out of the funds of the municipality.

That is not this case, as the plan in question is a plan of a parcel of land owned and surveyed by one person, and of a part only of the land comprised in the village.

What the section contemplates is a compilation of the several unregistered plans or surveys of the different parcels of land which compose the area of the town or village, or a new plan of the whole.

The plan of the whole village of Burlington, made by D. C. O'Keefe, in December, 1876, which is referred to in the affidavits, and annexed to the appeal book, is apparently a plan made under section 85, but as it was never registered or adopted, it need not be further referred to.

The 82nd section provides that whenever any land has been subdivided into town or village lots, so differing from the manner in which it was surveyed or granted by the crown, that it cannot, by the description given of it, be easily and plainly identified, the person making such survey, his executors, administrators or assigns, agents, attorneys or successors, shall, within three months from the date of such survey, lodge with the registrar a map or plan thereof, on a certain scale, shewing all roads, streets, lots and commons within the same, width and length of lots, &c.

Subsec. 2. Such plan is to be signed by the person or officer of the corporation by whom, or on whose behalf it is filed, and is also to be certified by some provincial land surveyor. All instruments affecting the land after plan is filed must conform thereto.

Subsec. 3 imposes a penalty for omitting to register the plan after demand in writing by the inspector or any person interested.

Section 83 is taken from, and carries forward section 76 of the former Registry Act, which enacted that in the case of sales of land made before the passing of that Act under surveys or subdivisions differing from the original crown survey the survey should be registered within six months after the passing of the act if the plan was still in existence and procurable for registration and filing under section 75, (the section corresponding to what is now section 82). And if it is not, a new survey or plan shall be made by and at the joint expense of the persons who have made such survey or subdivision, and of all others interested therein, by some duly authorized provincial land surveyor, as nearly as possible according to the proper original survey or subdivision, and the same, when so made, shall be filed *as if under the next preceding section, i. e.* section 75, the same as section 82 of the Revised Act, the provisions of which I have just stated.

I think it clear that the only right the municipality of Nelson had to file the Bates plan, or to prepare and file a new one, was derived under section 76.

It is the only section applicable to the state of facts which then existed, and which, as it seems to me, was the precise state of facts that section was intended to meet.

The original plan had not been registered, and was not then procurable for registration, and the statute required that a new plan or survey should be made at the joint expense of the persons who had made the former one, and of all others interested therein.

The municipality may properly be said to have been parties interested in respect of any streets laid down on the plan which had in fact become public highways, and in respect also of the market square; and I think they were parties interested within the terms of the section, and had the right to file the plan.

They did file it, and a plan so prepared and filed is filed *as if under* section 75 (R. S. O. ch. 111, sec. 82), that is to say by the person, or the representatives of the person, for whom the original subdivision survey was made.

Upon the evidence, and with the consent of the parties to the proceedings, the plan thus filed was to be treated by the judge, and was, I think, properly treated, as being Bates's plan, and as if filed by him or his representatives, upon whom the law had cast the duty of filing it.

The title of the respondent as assignee of Bates does not appear to have been contested, and therefore his status to make an application for an amendment of the plan under section 84, as an assign of the person filing or registering it, was made out.

But it was strenuously contended that the plan having been registered, and sales having been made in accordance with it, the spaces laid down or marked out thereon as streets were public roads or highways, and vested in the crown or the municipality by virtue of sections 525 or 527 of the Municipal Act.

The former section declares what shall constitute public highways :

(a) All allowances for roads made by the crown surveyors.

(b) Also all roads laid out by virtue of any statute.

(c) Or any roads whereon public money has been expended for opening the same.

(d) Or whereon statute labor has been usually performed.

(e) Or any roads passing through Indian lands.

Then section 527 provides that every public road, street or bridge, or other highway shall be vested in the municipality subject to any rights in the soil which the individual *who laid out* the road, street, &c., reserved thereon.

Neither the mere marking out upon a plan, of spaces for roads and streets, nor the registration of such a plan, nor the sale of lots according to it, nor all of these acts combined, will constitute an absolute dedication of the places so marked down as public roads or highways.

They may become so by any acts from which an irrevocable intention to dedicate them may be inferred, and by acceptance by the municipality, and then section 527 has its operation.

But until they do become so, section 84 expressly provides that a plan, although filed, is not binding, and though sales may have been made under it, is only binding *sub modo*, that is to say, to the extent that the court or a judge may think proper not to permit a proposed amendment.

I do not understand that section 84 is intended to authorize the judge to amend a plan by closing any road or street laid down thereon which has become a public highway in fact, though that is a fact he may have to determine.

If the public have acquired a right, I think it is not intended to be interfered with; but as between the lot owners, and the person who registered the plan, or his assigns, such amendments may be made, and on such conditions, as may be thought proper.

The appellants seem to be in this position. Either the municipality had the right to register the plan or they had not.

If they had, it could only be under section 83, and then the judge had jurisdiction to amend it at the instance of the respondent.

So far as appears his jurisdiction was properly exercised, and no public street or highway was closed up or interfered with by the order.

If, on the other hand, the municipality had not the right to register the plan, the order may be useless and void, but the by-law is none the less invalid as an attempt to take private property without compensation, under pretence of a right the existence of which is disproved.

In this view of the case it is perhaps unnecessary to decide whether an appeal lies from the judge's order. If it does, it is merely an additional reason for holding that the course pursued by the appellants was wrong.

Mr. *Lash* contended that no appeal would lie, because the judge of the county court, in making an order, does not act judicially or *qua* judge, but is only *persona designata* by whom the plan may be amended.

He relied upon the case of *Demorest v. The Midland Railway Co. (a)*, in which we recently held, following a decision pronounced by this court some years ago in *Norvall v. The Canada Southern Railway Co. (a)*, that when a judge hears an appeal in a railway arbitration, under section 20, subsec. 19 of the Ontario Railway Act (R. S. O. c. 165), no further appeal lies from his decision to the Court of Appeal. But the case before us is quite distinguishable. Under the Railway Act an appeal lies from the award of the arbitrators to "a judge of any of the superior courts of law or equity, and upon the hearing of such appeal *such judge shall decide*," &c.

And by section 20 the practice and procedure upon such an appeal are to be the same, as nearly as may be, as upon an appeal from a decision of the judge of the county court under the County Courts Act.

Such an appeal was at that time heard by the full court of Queen's Bench or Common Pleas, and there was no further appeal to the Court of Appeal.

Taking those subsections together, the court having no authority to hear the appeal, and no appeal being given to the court from the decision of the judge, but on the contrary, the appeal to him being compared to the appeal from a county court to one of the superior courts, whose order on the appeal was final, it was considered that no further appeal was intended, the judge acting as a person designated, and not as a member of or for the court.

But under section 84 the jurisdiction to hear an application to amend a plan is given to the Court of Queen's Bench or Common Pleas or of Chancery (now the High Court), and to any judge thereof.

That corresponds to the language of section 1 of the act respecting the custody of infants, now R. S. O. ch. 130, which enables "Any of the superior courts of law or equity or any judge of any of the said courts" to make an order on the petition of the mother of any infant, &c.

(a) Not reported.

In re Allen, 31 U. C. R. 458, it was held that an order made by a judge under that section might be discharged by the full court. See, also, *Jackson v. Randall*, 24 C. P. 87.

If a judge of the High Court makes an order in such a case as the present he is acting for the court, and I am disposed to think that his order is subject to review.

The cases of *Peterborough v. Wilsthorpe*, 12 Q. B. D. 1, 15 Q. B. D. 75, and *Dewsbury v. Assistant Commissioners*, 2 Times L. R. 375, may be referred to on this point.

Here the judge of the county court of the county in which the lands lie has concurrent jurisdiction with the High Court and the judges thereof to make the order. And under section 11 of the Local Courts Act, R. S. O. ch. 42, the junior judge of the County Court has the same jurisdiction in such a case as the senior judge.

Is such an order, when made by a County Court judge, subject to appeal? Without expressly deciding the point, it appears to me that a right of appeal is expressly conferred by 45 Vict. ch. 6, sec. 4.

"Any party to a cause or matter may appeal to the Court of Appeal from every decision or order hereafter given (by a judge of a County Court) in any cause or matter disposing of any right or claim, provided always that the decision or order is in its nature final, and not interlocutory."

The order in question comes, I think, within the terms of this section as being a final order, made in a matter pending before the judge, disposing of some right or claim, and would therefore be appealable.

On every ground taken the appeal, in my opinion, fails, and should be dismissed.

Appeal dismissed, with costs.

TRACEY V. FOWLDS.

Specific performance—Statute of Frauds—collateral evidence—Ratification, rejection of parol evidence as to nature of—Watercourse, reserving use of.

J. S. F. and his two brothers were joint owners of a lot of land which the former, without any authority from his brothers, agreed to sell to the plaintiff, and for a portion of the purchase money, signed a receipt "Fowlds Brothers," the name in which J. S. F. and one of his brothers carried on business. A watercourse ran through the lot which J. S. F. swore he expressly stipulated should remain open, this, however, was denied by the plaintiff and the receipt was silent in respect to it. The owners refused to execute any conveyance which did not reserve the use of the water, the brothers of J. S. F. swearing that they never would have sanctioned any sale that did not make such reservation, and that they had only approved of the sale effected by J. S. F. on his statement that it had been so reserved.

In an action for specific performance as claimed by the purchaser, PROUDFOOT, J., at the trial, rejected the evidence of the brothers as to the nature of the bargain reported to them by J. S. F., [and which they had ratified], and gave judgment in favor of the plaintiff.

Held, [reversing the judgment at the trial] that the evidence was improperly rejected, and there being no authority to J. S. F. either antecedent or subsequent to bind his co-owners, the plaintiff's case failed, and the action was dismissed, with costs.

At or about the time of the negotiations with the plaintiff it was alleged that other persons had been endeavoring to purchase the lot but failed on the ground that the owners insisted on the reservation of a right to use the water :

Quære, per HAGARTY, C. J. O., whether the evidence on this point was so collateral in its nature as to justify its rejection by the judge at the trial.

THIS was an appeal by the defendants from a judgment of Proudfoot, J., ordering the specific performance of an alleged agreement for sale of a lot of land in the village of Hastings, in the county of Northumberland.

The defendants Henry M. Fowlds and William J. Fowlds, with a brother James S. Fowlds, who died during the pendency of the action, were joint owners of the lands in question which James S. Fowlds, without authority from his co-owners, agreed to sell to the plaintiff.

The following receipt for fifty dollars paid at the time of agreement to sell, and two subsequent payments on account was the only memorandum signed by or for the vendors :

"Received from Mr. John Tracy, the sum of fifty dollars as part payment on a village lot, said village lot being the one between his present store and the bridge on the south side of Front street, price of said lot to be

the sum of seven hundred and fifty dollars for part deed and mortgage to be made out for three fourths of the above named price, and balance of the other quarter to be paid cash.

Hastings, 24th March, 1881.

FOWLDS BROTHERS.

Rec'd on this the sum of two hundred dollars, this 24th day of April, 1882.

FOWLDS BROTHERS.

Hastings, 26th April, 1881.

Rec'd the further sum of one hundred and fifty dollars, on this agreement.

FOWLDS BROTHERS."

The firm of "Fowlds Brothers," whose name was signed to the receipt, was composed of James S. Fowlds, and William J. Fowlds, who carried on business as general merchants and lumbermen. A watercourse ran through the lot which James S. Fowlds swore he expressly stipulated should remain open, and his co-owners also swore that they never would have sanctioned any sale that did not make such reservation, and that they only subsequently approved of it on the brother's statement that it had been so reserved. The learned Judge rejected the evidence of Henry M. Fowlds and William J. Fowlds as to what James stated the terms of the sale to have been. He also rejected evidence that about the time of the negotiations with the plaintiff one Wilson was endeavouring to purchase the lot, and the sale had fallen through as the owners insisted on the reservation.

The other facts are sufficiently stated in the judgment.

The appeal came on to be heard before this Court on the 24th and 25th of November, 1885.*

McCarthy, Q.C., and *Wallace Nesbitt*, for the appellants.
S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the respondent.

Paget v. Marshall, 28 Ch. D. 255; *Waterloo Mutual Insurance Co. v. Robinson*, 4 O. R. 295; *Watts v. Evans*, 4 Y. & C. Ex. 579; *Smith v. Wheatcroft*, 9 Ch. D. 223; *Morgan v. Griffith*, L. R. 6 Ex. 70; *London and Bir-*

**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

mingham R. W. Co. v. Winter, 1 Cr. & P. 57; *McDonell v. McDonell*, 21 Gr. 342, were referred to.

January 26, 1886. HAGARTY, C. J. O.—Assuming that James Fowlds entered into a contract on behalf of himself and his two brothers sufficient in point of law as a binding agreement on its face, the most important point to be established is the extent of his authority to bind the other two tenants in common.

The brothers were apparently willing that James should sell the lot, but they both swear that they were not willing, nor did they authorise him to sell, except reserving the passage for the water.

If this evidence be true, supported by the evidence of James on his death-bed, there was no intention on the part of any of the three owners to sell, except with such reservation.

If James had been sole owner and signed this receipt solely for himself—then if the Court believed that when it was signed James specially agreed with Tracey that the latter should build over the watercourse, leaving the passage unimpeded, I do not think specific performance would have been decreed.

Tracey wholly denied that there was any such agreement or understanding.

James being dangerously ill, was examined. He swore that in negotiating with Tracey he stipulated for the water passing free, and would not have agreed to sell otherwise, and discussed with him the use of arches or iron girders: that after these conversations and agreement as to the price, \$750, that he afterwards took a payment from him on account, and gave him the receipt produced, intending to have a formal written contract drawn between them that two persons, Wilson and Brennan, were at the same time negotiating for the lot, and the subject of building over the water was discussed with them. He says he kept no copy of the receipt, not intending it to be the contract.

\$ 50 paid with receipt.....	24th March, 1881
150 " " 	26th April, 1881
200 " " 	24th April, 1882

It is not easy to understand how it was that no difficulty seems to have arisen as to the nature of the bargain until 1883.

The plaintiff does not appear to have taken possession or entered on the land.

A great deal was said about the size of the lot. The plaintiff claiming seventy feet. The defendants urging that the bargain was only to the north side of the race-way with liberty to plaintiff to build over the water to the island so that he would have seventy feet. At the time of the bargain the lot was not surveyed.

I do not feel pressed by any difficulty as to the size of the lot. The whole question is, whether the true bargain was absolutely, as plaintiff asserts, or with the reservation as to the water.

It rests with the plaintiff to prove the true effect of the bargain with James, and the extent of his authority to bind his co-tenants.

There is no authority shewn in the first instance, as I consider, and the plaintiff has to rely on the admissions and conduct of the parties to such authority as a ratification of the act of James. I think it proved that he had their authority to sell, but as they insist only in a particular manner, as defendant William says that the bargain he authorized was a sale "from the street to the race, with the right to build across."

Now, in deciding whether they ratified what was done by James we have to inquire what it was that they ratified. For this purpose it seems to me to be necessary to inquire what they understood that James had done.

With great submission to my learned brother who tried the case, I think that the co-tenants had a perfect right to state what it was that James reported to them that he had done. It would be the extent of their knowledge on this head that would explain their admissions and their

conduct. James had given a receipt; no copy was kept, and all the brothers knew was from what he told them as to the alleged bargain. If it be true that they understood that the right to the passage of the water was reserved, it explains their apparent acquiescence and the receipt on the joint account of the several payments. If James told the truth in his death-bed evidence he understood it in the same way. He was acting for himself and as agent for his brothers in making the sale. It appears to me, in the absence of proof of the extent of antecedent authority, it is impossible to deny to the principals the right to state on his report what they understood he had done, and on which they made any admissions and acted as they afterwards did.

As to the rejecting of evidence as to Wilson and other persons applying to purchase about the same time as the dealing with the plaintiff for the lot, there is of course a difficulty about the reception of such evidence unless the plaintiff can be connected with it.

If the matter were unaffected by authority, it does not seem very clear why it might not be material.

The issue is whether, as plaintiff swears, the sale was absolute, or as the defendants swear that the passage of the water was reserved as an important matter to them, and that they never intended to abandon this.

If it were shewn that a few days before the dealing with Tracey they had tried to sell the lot by public auction and announced the reservation, or had advertised the lot for sale with the reservation, it might of course be urged that these matters had nothing to do with their written bargain with Tracey, at all events unless he was aware of their intentions to make this reservation, and even then they could still agree to sell to him absolutely. But here we have to weigh the evidence and ask ourselves whether it is the truth, as defendants swear that they never intended to sell absolutely and, for myself, I hesitate to call the evidence here tendered as so collateral to the inquiry that it was properly rejected, especially when there was no jury

to be influenced by it, if improperly received. But I do not base my judgment on this point.

No attempt was made to impeach the veracity of the deceased James Fowlds, nor of his co-tenants, nor is there any suggestion of a reason for the defendants refusing to complete the contract on any ground of increased value in the property or inadequacy of the price offered. They have offered before suit to pay back to the plaintiff all his money with interest. He does not appear to have made any improvements, or altered his position as to the land.

I do not look upon this case as involving any disregard of the common rule as to the judge's decision on contradictory statements. James Fowlds, the deceased, and the other two co-owners swear to their understanding of the bargain. There is a good deal in James's statement that a formal contract was to be executed. It is not usual to say as in this receipt that a mortgage is to be made out without any provisions as to its date of payment, rate of interest, &c.

On the whole I feel compelled to come to the conclusion that the plaintiff's case fails, and that even if we do not give full credence to James Fowlds's statement as to what actually took place between him and Tracey there is no authority, either antecedent or subsequent, shewn to bind his co-owners. Their subsequent conduct and alleged admissions must be judged by the extent of their knowledge of what their brother James had done, and what was the nature of the bargain which he informed them he had entered into with Tracey. The defendants were entitled to prove the nature of the bargain reported to them by James.

I think we should allow the appeal.

BURTON, PATTERSON, and OSLER, JJ.A., concurred.

MCDONALD V. McRAE.

Dower, right to, barred—Widow's possession of premises—Lapse of time.

The owner of land died intestate in 1858, leaving his widow and two infant daughters in possession, all of whom continued to occupy and cultivate the farm until 1883, when the daughters left the premises. In February, 1884, the widow intermarried with J. M. No proceeding had meanwhile been taken or claim made by the widow to have dower assigned to her. In an action brought by the daughters against J. M. and his wife, to recover possession thereof, the mother claimed she was entitled to retain possession of the premises in respect of her dower, but *Held*, that the right to dower was barred by 38 Vict. ch. 16, s. 14, (O) which requires proceedings to be taken to enforce a widow's dower within ten years from the death of her husband.

APPEAL by the defendants from the judgment of Cameron, C. J., at the trial of the action.

The statement of claim set forth that the plaintiffs, Ellen McDonald and Joan Buchanan were the co-heiresses of John Buchanan, late of the township of Kenyon, farmer, who was, at the time of his death, the owner in fee of the lands and premises in question, and who died in possession thereof, in or about the year 1858, intestate, leaving the plaintiffs his only heiresses-at-law, and leaving him also surviving his widow, the defendant, Ann McRae, who since his death and in February, 1884, intermarried with and became the lawful wife of the defendant John McRae; that the plaintiffs, who were living with their father, on the said lands at the time of his death, continued in the occupation thereof until the latter part of 1883, when they temporarily left the premises and went to reside on a property in the immediate neighborhood; and the defendant, Ann McRae, continued to reside on the said premises; and ever since the month of February, 1884, when she intermarried with the defendant John McRae, the said defendants had been in the possession and occupation of the said premises, and refused to deliver up possession to the plaintiffs.

The plaintiffs claimed that they were entitled to the said lands and premises as the legal representatives of the

said John Buchanan, and claimed possession of the same and further and other relief.

The defendant John McRae disclaimed all ownership of, and denied that he had refused to quit the said premises, alleging that he had resided thereon as the husband of the said Ann McRae, and at her request, she claiming to be entitled to an interest therein.

The defendant Ann McRae admitted the allegations contained in the statement of claim that she was the widow of John Buchanan, and also, that she was in possession of the premises in question.

And by way of counter-claim stated as follows :

That she had been the lawful wife of Buchanan ; that said John Buchanan at the time of his death was seised in fee of the premises in question, being lot 9, in the 9th concession of Kenyon, and that she was entitled to an undivided third part of the premises as dowress of the deceased ; and under the circumstances claimed dower in the premises aforesaid ; that the claim of the plaintiffs each to an undivided half of the premises was subject to her right to dower therein, and asked that her dower might be set apart, &c.

The plaintiffs, in reply to the counter-claim, admitted that the defendant Ann McRae had been the lawful wife of the deceased, and that the deceased at the time of his death, was seized in fee of the property in question ; but denied that she was entitled to dower therein, alleging that if she ever was entitled thereto, her claim had been barred by the Statute of Limitations in force in this Province ; and pleaded as a defence to the counter-claim, The Revised Statutes of Ontario, chapter 108, known as the "Real Property Limitation Act."

The action was tried at Cornwall, on 2nd of October, 1884.

Both the defendants were examined on the trial, and their evidence established that the plaintiffs had resided on the property with their mother from the death of their father in 1858, until the autumn of 1883, when the plaintiff

Ellen was married, and two days after the other plaintiff went to Montreal; and that during all the time of their joint occupation, the mother and daughters had worked the farm, and that no assignment of dower in favor of the mother had ever taken place.

After taking time to look into the authorities, on November 15th, 1884, the following judgment was delivered by CAMERON, C. J.—I find that John Buchanan, in the pleadings mentioned died seized of the land in question, and that the plaintiffs are his co-heiresses at law. I also find that the defendant Ann McRae was the wife of the said John Buchanan; that the said John Buchanan died in the year 1858, and at the time of his death the plaintiffs, then infants, and the said Ann McRae resided and continued to reside on the said land up to the time of her marriage with the defendant John McRae, a short time before this action was commenced. I further find that the said Ann McRae was, at the time of the death of her former husband, John Buchanan, entitled to dower in the said land, but that she continued to occupy and cultivate the said land for the benefit of herself and the plaintiffs without any arrangement or understanding as to her dower, and without any assignment thereof; and that her right to maintain an action for the said dower was barred by operation of the Act 38 Vict. ch. 16 (O),* on the 1st day of July, 1876.

As the said Ann McRae had no title to the said land, I find that the defendants, John McRae and Ann McRae, were in possession thereof, and direct that judgment be entered for the plaintiffs for the recovery of the said land, with costs of suit against both defendants.

Moss, Q. C., for the appellants. The defendant Ann McRae has been in continuous and undisturbed possession of the property in question for twenty-five years prior to the commencement of this action, and by reason thereof has become the absolute owner; and the rights and claims of the respondents thereto have thereby become extinguished.

* Section 14. "No action of or suit for dower shall be brought but within ten years from the death of the husband of the demandant, notwithstanding any disability of the demandant, or of any person claiming under her; and section twenty-two of the Act passed in the thirty-second year of the reign of Her Majesty chaptered seven is hereby repealed."

It is admitted that she had an interest as dowress in the lands; her possession therefore of the whole was not inconsistent with such interest. Under any circumstances, she has a right to assert her claim by possession to that part in which she had an interest. Her possession, when she had an interest, cannot be regarded as the possession of the respondents, at least not as to the one-third which she was entitled to as dowress; and although it may be contended that at the commencement of this action she had not any right of action in respect of her dower, her claim to dower was in no wise impaired; and having chosen to exercise her right by taking possession, she cannot be ejected from the premises, thereby ignoring her right to dower.

The facts and circumstances of this case cannot operate as a bar of her right to dower, consequently that right still exists unimpaired. There has not arisen any state of facts calling on her to enforce that right otherwise than by retaining possession, which, if not such as to bar the respondents' title to the land, ought at least to be ascribed to her right as dowress, and will enable the Court to hold the respondents' claim to be subject to such right. Her possession having been consistent with her interest, she will not be ejected from the premises without some recognition of her rights.

As to the defendant John McRae, he, never having asserted any claim and having disclaimed all interest in the property, should not have been ordered to pay costs.

MacLennan, Q.C., for the respondents. *Fraser v. Fraser*, 14 C. P. 70, shews that Mrs. McRae did not acquire title by length of possession, for the respondents, who were seized in fee of the premises, were in possession until 1883, and the appellants never had any possession adverse to them. It is contended that Mrs. McRae's right of dower has become barred by the statute of limitations, as before the passing of 38 Vict. ch. 16 (R. S. O. ch. 108), more than ten years had elapsed since the death of her late husband John Buchanan: *Laidlaw v. Jackes*, 27 Gr. 101; *McDonald*

v. *McIntosh*, 8 U. C. R. 388; *German v. Grooms*, 6 U. C. R. 414; *Leach v. Shaw*, 8 Gr. 498; *Banks v. Bellamy*, 27 Gr. 342. These cases establish that Mrs. McRae never was in possession of the land as dowress, dower never having been assigned to her.

March 4, 1886. The judgment of the Court was delivered by

OSLER, J.A.—This is an action for the recovery of land brought by the heirs of the deceased owner against their mother, his widow, and her second husband.

The female defendant admits that she is in possession, and by way of counter-claim alleges that she is entitled to an undivided one-third part of the premises in question as dowress of her former husband John Buchanan, deceased, and prays that the plaintiffs' claim may be declared to be subject to her right of dower, and that such dower may be set apart, &c.

The plaintiffs answer the counter claim by alleging that the defendant's right of dower, if it ever existed, has been barred by the statute of limitations, which they plead as a defence to it.

The learned Chief Justice found on the evidence that the defendant's former husband, John Buchanan, died in the year 1858, and that at the time of his death the plaintiffs, who were then infants, and the defendant Ann McRae resided and afterwards continued to reside on the land up to the time of her marriage with the defendant John McRae, a short time before the action was commenced. He also found that the defendant Ann McRae was, at the time of the death of her former husband John Buchanan entitled to dower in the land, but that she continued to occupy and cultivate it for the benefit of herself and the plaintiffs, without any arrangement or understanding as to her dower, and without any assignment thereof, and that her right to maintain an action for the assignment of her dower was barred by the operation of the Act 38 Vict. ch 16, (O.), on the 1st July, 1876.

Judgment was therefore entered for the plaintiffs.

The question argued before us on this appeal was whether the widow's right to maintain an action by way of counter-claim for her dower was barred by the Statute of Limitations, or whether she was prevented by the operation of the statute from interposing her claim for dower as a defence for an undivided one-third of the land.

In whatever form the question is put, we think it must be answered adversely to her, and consequently that the judgment at the trial must be affirmed.

The recent Act 43 Vict. ch. 14 sec. 3, (O.), enacts that where a dowress has, after the death of her husband, actual possession of the land of which she is dowable, either alone or with the heirs or devisees of her husband, the period of ten years within which her action of dower is to be brought, shall be computed from the time when her possession ceased.

But this section does not assist the dowress in the present case, as it goes on to enact that it shall not apply where her right of action had ceased before the passing of the Act. Unless, therefore, contrary to the assumption on which the statute was passed, her actual possession in some way saved her right, it was barred in July, 1876, by force of the Act 38 Vict. ch. 14, secs. 14 and 16. (R. S. O. ch. 108 sec. 25.)

It was not attempted to impugn the decision in *Macdonald v. McIntosh*, 8 U. C. R. 388, and similar cases ending with *Laidlaw v. Jackes*, 27 Gr. 101, in which it has been held that the fact of the widow remaining in possession of her husband's land made no difference as to the necessity she was under of suing for her dower within the period of limitation after his death. Having no title to any part of the land, her possession cannot be attributed to her right of dower. Her position is clearly stated by Mr. Justice Draper in the case first referred to at p. 395:

"The right of the widow immediately on the death of her husband is a right of action, not a right of entry * * * Until dower is assigned, she has the right only, no estate

in possession. The heir or other tenant of the freehold may assign dower to the widow, and this even though the heir be an infant. But if such an assignment be not voluntarily made, she must bring her action; for, 'in dower where the writ demandeth nothing as certain (only an unascertained part in certain premises) there the demandant after judgment cannot enter or distrain until execution sued, by which execution the sheriff is by the King's writ to deliver the third part in certainty to the demandant.' "

Her dower, therefore, does not and cannot become an estate in possession until such a judgment or delivery

See also *Allen v. The Edinburgh Life, &c.*, 23 Gr. 306, 314, per Proudfoot, J.

What the defendant relied upon, however, was that she was in possession of the land not as a trespasser, but as guardian in socage of the plaintiffs, her minor children, and the opinion expressed by Mr. Justice Proudfoot, in the case of *Laidlaw v. Jackes*, 27 Gr. 111, was referred to in support of the contention that under such circumstances, being lawfully in possession of the whole, she cannot be treated as being in possession for the heirs subject to her dower as to an undivided two-thirds, and as to the remainder in her own right as dowress. This view was not assented to by the majority of the court, and having regard to the nature of the widow's right as above laid down, it appears to us untenable. The reason given by the Chancellor seems to be entirely different, namely, that such possession would not have been a bar to her action for dower against the heirs or its assignment to her. She was in short under no disability by reason of her possession, whether guardian in socage or trespasser, except in so far as in the latter case her adverse possession of the whole being a disseizin of the heir, might have been pleaded in bar of her action: per Draper, J., *McDonald v. McIntosh*, *supra*.

But apart from these considerations, and whether her possession of the whole land was rightful or of wrong, she is in the present action attempting actively to set up and

prosecute her claim for dower; whether as a defence or a counter-claim the proceeding is useless unless her third part can ultimately be assigned to her in severalty. The statute then appears to be a conclusive bar to her claim enacting as it does that no action of or suit for dower shall be brought but within ten years after the death of the husband of the dowress, notwithstanding any disability of the dowress.

If her dower has not been assigned and it becomes necessary to sue for it, it seems impossible to argue that the statute does not apply merely because in taking an account of the rents and profits at the instance of the heir, she would be allowed to set off a third of the profits for the right of dower.

We think the appeal must be dismissed.

Appeal dismissed, with costs.

YOST V. ADAMS.

Will, construction of—Direction to pay debts—Power of executors to sell lands of heir—Intestacy—R. S. O. ch. 107 secs. 17-19.

A testator directed his executors to pay all his "funeral charges and just debts." The residue of his estate and property not required for that purpose he disposed of as follows: To his wife all his household furniture, his pew in a named church, and all cash in hand at his decease, also to his wife the entire, exclusive and undivided use of his house situate, &c., to hold the same during her natural life, then the proceeds to be equally divided, &c., he also gave and bequeathed the proceeds of the homestead to be equally divided, &c. There were other lands not mentioned in the will.

Held, [affirming the judgment of the court below] notwithstanding there was an intestacy as to such unspecified lands that the executors could make a good title to a purchaser thereof [BURTON, J. A., dissenting.]

Per BURTON, J. A. The charge arose only by implication and might be controlled or enlarged by subsequent expressions in the will, and might therefore, perhaps, be extended to lands which the testator disposed of by the will, but the will contained no expression indicating an intention to charge the descended lands, and the executors consequently could not make a good title.

AN appeal by the plaintiffs from the judgment of Boyd, C

The action was one seeking the specific performance of an agreement for sale and purchase of part of the real estate of the Rev. E. Adams, deceased, in which at the trial judgment was given in favor of the plaintiff; specific performance ordered in case a good title could be made; and a reference was directed to the master at Walkerton to inquire as to the title, who reported that a good title could not be made, whereupon the defendant appealed, and on argument before the Chancellor the finding of the master was reversed (8 O. R. 411).

The material parts of the testator's will were as follow:

"First, that my funeral charges and just debts shall be paid by my executors hereinafter named. The residue of my estate and property which shall not be required for the payment of my just debts, funeral charges, and the expenses attending the execution of this my will, and the administration of my estate I give, devise, and dispose of as follows, to wit: I give and devise to my beloved wife Betsy Adams all my household furniture, my pew in the Wesleyan Methodist Church in Drayton, and all cash in hand at my decease to have and to hold to her and her heirs, executors, and administrators to her and their use and behoof for ever. I do also bequeath to the said Betsy Adams my beloved wife the entire

exclusive and undivided use of my dwelling house situate in Drayton, township of Peel, county aforesaid where I now reside to have and to hold the same during her natural life then the proceeds of said dwelling house to be equally divided between my heirs. * * I give, devise, and bequeath the proceeds of the homestead to be equally divided," &c., and he nominated his two sons his executors.

The other facts and circumstances appear more fully in the former report, and in the present judgment.

The appeal came on to be heard before this Court on the 24th of November, 1885.*

H. J. Scott, Q. C., for the appellant. The property in question is not part of the homestead and dwelling-house mentioned in the will, and is not referred to in it, therefore as to it the deceased died intestate. In no sense therefore can it be said that this parcel is charged with the payment of debts, under the Act respecting trustees and executors, R. S. O. ch. 107, secs. 17-19.

The general direction in the will to pay debts does not charge the lands with their payment as required by that Act, or give the executors power to sell them.

To charge land with the payment of debts, there must be the direction to the executors to pay them, and a devise of the estate to the executors or to some one else: *Bailey v. Bailey*, 12 Ch. D. 269; *Doe d. Jones v. Hughes*, 6 Ex. 223; *Stronghew v. Ashley*, 1 D. M. & G. 635; *Re Tanqueray, Willaume and Landau*, 20 Ch. D. 465; *Corser v. Cartwright*, L. R. 7 H. L. 731.

The presumption is, that debts are to be paid out of the estate that comes into the hands of the executors. The land here did not: *Bailey v. Bailey*, supra; and the intention of the testator, if otherwise, must be clear, or the heir-at-law will not be disinherited: *Re Davis to Jones and Evans*, 24 Ch. D. 190; *Re Morgan Pillgrem v. Pillgrem*, 18 Ch. D. 93; *Re Cameron, &c.*, 26 Ch. D. 19.

There being no devise of the land in question to the executors an inquiry as to debts was necessary, and there being no debts, and this fact being known to the pur-

*Present, HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, J.J.A.

chaser the executors had no power to convey this land : *Corser v. Cartwright*, supra.

Moss, Q.C., for the respondent. It is submitted that the directions in the present will to pay debts were sufficient to charge, them on the testator's lands : *Greville v. Browne*, 7 H. L. C. 689 ; and the authorities clearly shew that, under the circumstances here appearing, the executors had full power to sell and convey the property.

January 26, 1886. HAGARTY, C. J. O.—I shall first notice the provisions of our statute sec. 17, (R. S. O. ch. 107,) where a testator charges his real estate with the payment of his debts, &c., and devises the estate so charged to trustees, &c., and makes no express provision for the raising of such debt, &c., out of the estate the devisees in trust may sell

Section 19, where the testator who creates such a charge, does not devise the real estate charged, in such terms as that his whole estate and interest therein become vested in any trustee, the executor or executors so named, &c., shall have the same or like power of raising said moneys as is hereinbefore conferred on the devisee in trust &c., the sale to operate only on the estate or interest legal or equitable, of testator, &c.

Section 20, purchasers, &c., shall not be bound to inquire whether the powers under sec. 18, 19, and 20, have been duly exercised, &c.

Section 22, where in a will there is any direction, whether express or implied, to sell real estate and no person is appointed to carry the same into effect, the executors named may do so.

Section 19 comes the nearest to this case. There is no express devise to executors or trustees, and as to the land here in question there appears to be an intestacy, though he specifically devises part of his estate to his wife for life, remainder to his heirs.

I think we must read the will in the same light in which it appeared to the learned Chancellor, as "clearly import-

ing an intention that the debts are to be paid first out of his estate and property, and then the residue is disposed of. This creates a charge of the debts upon his lands, and the mere failure of the testator to enumerate all his lands, in the subsequent part of the will, by which there is an intestacy as to the part in question, will not detract from the conclusion that all the lands are so charged."

I think this conclusion is correct, and also that the executors have power to sell under sec. 19 of the statute.

The Imperial statute 1859, 22-3 Vict. ch. 35, secs. 14 and 16, contain provisions similar to our secs. 17 and 19.

Baron Parke's judgment in *Doe v. Hughes*, 6 Ex. 223, relied on by Mr. Scott, and frequently cited, has been seriously questioned. See notes to *Wms. on Executors*, Vol. I. 656, ed. 1873, in notes.

Attention is called to the fact that it was decided long prior to the Imperial Act of 1859.

The same note suggests a distinction where the direction that the debts shall be paid is coupled with a direction that they are to be paid by the executors, for that in such case "it is assumed that the testator meant that the debts should be paid only out of the property which passes to the executor," citing *Cook v. Dawson*, 29 Beav. 123, in appeal 3 D. F. & J. 127.

On examining this case of *Cook v. Dawson*, I think it probably did not fall within the statute which came into effect in the same year in which the testator died. It is not referred to in the case.

Vendors and Purchasers, 14 ed. p. 662, Lord St. Leonards in the note seems to doubt *Robinson v. Lowater*, 17 Beav. 592, affirmed 5 D. M. & G. 272, and discusses several cases including *Cook v. Dawson*, but adds, "The law is now made clear by 22-3 Vict. ch. 35, ss. 14-15, 16, *et al.*"

Hawkins 285, Theobald 360: "The question whether a charge of debts on land gives the executors a power of sale, has become of small importance since Lord St. Leonards' Act, 22-3 Vict. ch. 35, sec. 14, 18." See pp. 361, 362, 363.

The difficulty which arose in the case there cited of *In re Clay and Tetley*, 16 Ch. D. 3, that an administrator

could not sell as executor, was anticipated and provided for by sec. 23 of our statute, which enables an administrator with the will annexed to execute a power of sale express or implied, given to the executors. See *Stuart v. Baldwin*, 41 U. C. R. 446. The effect of the Act is discussed in *Hayes & Jarman*, 575, ed. 1883.

In *Lewin*, on Trusts, 8th ed., 1885, the question is well discussed, pp. 465, 466, 467, 468, 469, the objections to *Doe v. Hughes*, are pointed out, and the changes made by Lord St. Leonards' Act explained. The writer explains sec. 16 thus: "Where a testator charges his debts or any legacy, or specific sum and has not devised the estate to a trustee or trustees, the executors for the time being may sell," &c. He also points out that the sale is of the estate, whether legal or equitable.

The subject is also discussed in notes to the leading case, *Elliot v. Merriman*, 1 W. & Tud. ed. 1877, at p. 95, and the cases reviewed: at p. 105, the effect of Lord St. Leonards' Act is noticed.

I may also refer to the judgment of the Vice Chancellor of Ireland, in *Re Fisher*, 13 L. R. Ir. at p. 551.

Davies v. Jones and Evans, 24 Ch. D. 190, may be noticed.

No estate was given to the executors; the debts were to be paid by them; it was held by Pearson, J., that under the words of the will, he must hold that they had the legal estate and could make a good title to the purchaser. He cites *Anthony v. Rees*, 2 Cr. & J. 83, where Bayley, B., says as to the will, "where trustees are directed to do anything for the performance of which the legal estate is requisite, they are to have the legal estate."

As to the words in this will creating a charge on the estate Lord Cairns says, in *Corser v. Cartwright*, L. R. 7, H. L. 731: "The testator began his will by a direction that all his debts, &c., should be paid, and there is no doubt that unless it is counteracted by something which afterwards appears in the will, a direction of that kind, according to all the authorities, recognized now for a very great length of time in the Court of Chancery, would be equivalent to a charge of all his debts on his estates."

I have not seen any case in which the point arose as to the meaning of sec. 19, as to its effect on an intestacy of part of the real estate.

It appears to me in effect to provide for any case in which the whole estate of the testator is not devised, as provided in sec. 17. Section 19 covers in terms the case where he does not devise it so that his whole estate therein becomes vested in trustees.

The cases on this were generally within the words cited at p. 105, 1 W. & Tud. from *Hayes & Jarman's Forms of Wills*, 467: "giving the executor power to sell, &c., when the estate is cut up by successive limitations without the intervention of a trustee of the legal fee."

Looking at the various clauses of the Act, and the difficulties which it proposes to provide for, I have come to the conclusion that sec. 19 covers all cases, not only where there is not a devise of the whole interest, but where the testator has made no mention of, or dealt with, the land in question either specifically or in general residuary words.

It may be that sec. 22 which is not in Lord St. Leonards' Act may apply to this will, as containing an implied power to sell, consequent on the charge of debts.

It would, I think, be opposed to the spirit of this legislation to hold that if a man possessing several estates, appoints executors, and directs them to pay all his debts, by accident or carelessness dies intestate as to his most valuable property, leaving debts that cannot be paid except by recourse to it, that the executors cannot sell.

If this testator had no other realty except the homestead devised to his wife for life, with remainder over, or, as here, with "the proceeds to be equally divided between my heirs," I think there would be little doubt of the executors' power to sell for payment of debts.

I must not be understood as questioning or discussing the learned Chancellor's view, as to the law being with the respondent without the aid of the statute. As to the question of fact, as to the existence of debts at the time of the contract of sale, I accept the view of the learned Chancellor.

The report is silent on this head.

I think the appeal must be dismissed.

BURTON, J. A.—I think the only point for consideration in this case is, whether the charge for the payment of debts extended to the lands which descended to the heir-at-law, or was confined to the personalty, or to those lands with which the testator was dealing by his will. No doubt if, as we find in so many of the cases which have been referred to, there is a general charge by a direction generally that the testator's debts shall be paid, even where there is no devise or mention of realty, it will nevertheless in the hands of the heir be converted into equitable assets, and that wherever such a charge is made, without qualification, it will override every disposition either as against the devisee, or the heir-at-law.

It is also well established by the cases that a general charge will not be affected by a *subsequent charge* on the residuary personal estate, as the presumption in favor of charges for the benefit of creditors cannot be repelled by any thing short of clear and manifest evidence of a contrary intention.

But notwithstanding such a general direction for the payment of his debts, if the testator specifies a particular fund for the purpose, the charge will be confined to that, because the general charge is by implication controlled by the specific charge made in the subsequent part of the will.

Thus in *Palmer v. Graves* 1 Keen 545, the will commenced. "In the first place, I direct my just debts, funeral expenses, and the charges of proving this my will, to be duly paid." These words, if not limited or controlled by any thing else in the will, were sufficient to constitute a charge of all the real estate with the payment of debts. Not a clear *express* charge on the testator's lands, but a charge by implication, capable of being explained by subsequent words or a subsequent provision for the payment of debts.

Then after several specific devises he gave to John Graves a small quantity of silver plate, together with the rents and profits of certain freehold and leasehold estates, which rents and profits he charged with the payment of his debts.

It was there held that the general charge was by implication controlled by the specific charge made in the subsequent part of the will, following *Thomas v. Bretwell* 2 Ves. 313, and *Douce v. Lady Torrington* 2 My. & K. 600.

In the first of these cases the testator first ordered all his debts to be honorably paid immediately after his decease, and in a subsequent part of the will devised certain hereditaments, excepting H. & R., to trustees upon trust to sell, and from the proceeds to pay and discharge his debts and funeral expenses and all legacies given by that will or any other writing under his hand. He afterwards directed that H. & R. should be for the payment of the legacies mentioned in the will.

The Master of the Rolls held that H. & R. were not subject to the payment of debts. Though in the first part the Court might take the whole real estate to be charged, yet as there was no express lien on the real estate by these general words, and the testator afterwards appropriated certain part of his real estate for debts, and other part for debts and legacies, and other part for legacies, it was too much to lay hold of the general words that the whole should be charged with the payment of debts. It could be done only by implication on the general words which might be explained afterwards, and that implication destroyed.

Again, in *Corser v. Cartwright*, L. R. 8 Ch. 971, there was a general direction that the testator's debts and legacies should be paid, then numerous bequests and specific devises, and as to certain freehold estate, and all the residue of his real and personal estate subject to and chargeable with his just debts and funeral and testamentary expenses and legacies, he devised to I, and made him and one S. his executors. It was held by James and Mellish, L. JJ., that the implied charge was inconsistent with and must give way to the specific charge, according to the maxim *expressum facit cessare tacitum*, and consequently that I, the devisee of the specifically charged estate, and one of the executors, was the proper person to raise

money to pay the debts, and not the two executors under the implied charge.

In a case before Knight Bruce he referred to the two cases of *Douce v. Lady Torrington* and *Palmer v. Graves* 1 Coll. 156, and without expressing either assent to or dissent from those cases, held in construing the will then before him, that as at the commencement of it, it plainly expressed an intention to charge all the property with all the debts, and the following parts of the will did not contain any sufficient indication of a contrary intention, therefore, according to the true construction (whatever might be the order of precedence in which the testator considered the property chargeable), all the property was charged.

I of course concede that where there is an express charge it will not be affected by the appropriation of particular lands for the purpose of paying debts: see *Ellison v. Craig*, 2 Ves. 568; or a qualified charge in the same will, *Crallon v. Oulton*, 3 Beav. 1, and *Jones v. Williams*, 1 Coll. 156, to which I have already referred.

Applying then the principle of these cases what do we find? The first clause of the will directs that his funeral charges and just debts shall be paid *by his executors*. In such a case it will be presumed, unless land be devised to them, that the debts are to be paid exclusively out of the assets which come to them as executors, or in other words out of the personal estate. This land was not devised to them, and we have therefore to see whether in any subsequent part of the will the charge is extended, and to what extent.

In the cases I have referred to, the charge was not originally confined to the personalty, but extended to realty and personalty alike, and the question was, whether the implied charge thus created was cut down by any subsequent expression. Here we have to ascertain that the limited charge, that is the charge upon the personalty, is extended, and if so, to what does it extend.

Placing the construction which it is universally conceded is to be given to the first portion of this will unless controlled by other portions of it, it may be read thus: My will

is, that my funeral expenses and just debts shall be paid out of my personal estate. Then follow these words: the residue of my estate and property, which shall not be required for the payment of my debts, I give and dispose of as follows. So far there is no indication of an intention to extend the charge beyond the personalty. When a man first says my debts shall be paid from my personal property, and then refers to a *residue*, he must be taken to mean what is left of that personal property after payment of the debts, but when he comes to specify what it is that he gives and disposes of, we find him first dealing with specific personal property which he gives to his widow; a pretty clear indication that in his mind at all events there would be a residue of that personal property after payment of debts, which is further confirmed by a bequest to her of the interest on a promissory note, which note is to be cancelled on her decease.

But the devise is not confined to personal estate. He devises his dwelling house and his homestead, which may or may not mean the same thing. I say so because I find in one place the proceeds are to be equally divided among the heirs, and in the other, among the heirs with one exception.

It is at least arguable that there is nothing here to extend the original charge beyond that on the personal property, as the word "residue" in such connection could refer only to that, and that the real estate devised was not charged by implication. That point is not however before us for decision, and I only refer to it because in my opinion if it does extend to the land which he was proposing to dispose of by the will, there is nothing to lead to the inference that the testator intended a general charge.

The charge if any is only by implication, and can extend only in my view to those matters with which he was professing to deal by the will.

If he had, instead of confining the direction in the first clause to the personalty, directed that his debts should be paid from the personal estate and from the land hereinafter

referred to, there could be no question that that land alone would be charged; can it make any difference that the intention to charge that land, is to be gathered only by implication from the fact that he refers to it in connection with the residue of the personal property, and then disposes of it, and is it a reasonable view that in the one case the land not devised is to be charged, and not in the other?

It is said the implication that the debts were to be paid from the personalty is rebutted by what follows. I admit that it is rebutted in a qualified sense, or to speak with more accuracy is controlled or enlarged by what follows, and to that extent the charge is probably enlarged by making it apply to the land disposed of by the will; but it is difficult to see how that implied charge is to be extended to lands which he had no intention of disposing of in that manner.

It has a very persuasive ring about it, to say that he surely intended that the property which went to his heir, should be charged rather than that specifically devised; but the moment we do that we find ourselves in the realms of conjecture. For any thing we know it may have been his intention to secure a fair distribution of his estate by allowing the property to go to the heirs free from any charge, and for equality to have imposed the charge on the personal property, and in certain contingencies upon the real property specifically devised, and we have therefore to be guided by legal principles. We have the high authority of Lord Macclesfield for holding that as, plain words are necessary to disinherit an heir, so words equally plain are required to charge the estate of an heir, for a charge is *pro tanto*, a disinherison.

In *Greville v. Browne*, 7 H. of L. 689, although Lord Wensleydale expressed doubts, it appears to me that no other decision could have been arrived at than the one given by the majority of the Law Lords upon the facts of that case.

There was first a charge of legacies upon real estate. Then legacies which were *prima facie* a charge upon personal estate, and then a devise in these terms. "As to all the

rest, residue, and remainder of any property I may die possessed of or entitled to, * * I devise the same to my son." So that there was a case in which a portion of the real estate was by the charge given to one, a portion of the personal estate given to another, and then a devise of the residue of both to a third, the *whole being blended together in one mass*.

The residuary devisee took every thing the testator had to give and the entire source from which the legacies could be paid, and as Lord Kingsdown remarked, "no one could suppose that he meant to distinguish between the two, and that the one should be subject to legacies and the other not."

It may be noted, too, there, that the testator disposed and intended to dispose of every thing to which he might be entitled at his death. All that the testator intended in this case to dispose of was the residue of the personal property and the real estate specifically devised.

I do not think the case of *Dowling v. Hudson*, 17 Beav. 248, referred to by the learned Chancellor, advances the argument as to the charge extending to the undevised land. There the will first directed the debts to be paid by the executors, but the residuary devise of all his property real and personal was to the testator's son, *subject as aforesaid*. There could be no doubt about the property thus devised being subject to the charge, but it is important in this view that the son, the devisee, had power to give a good receipt for the purchase money, and the purchaser was not bound to make good the charges.

Nor does *Graves v. Graves*, 8 Sim. 55 lead to any such conclusion. I have already conceded that if the charge extends to all the estate *cadit quæstio*. What I hold here is, that the words have no such extended meaning but are limited to the estate which he was disposing of by the will. *Shallcross v. Finden*, 3 Ves. 738, is to the same effect as *Graves v. Graves*, and the doctrine cannot be successfully disputed; once make it out clearly that a charge worded as this is, extends to the descended land, there is nothing further to be said in my opinion; because, whatever difference

of opinion may have existed as to the decision in *Robinson v. Lowater*, 17 Beav. 532, it must now be considered as settled that where there is a general charge of debts upon real estate the executors had in equity an implied power to sell, although it is said that as they did not take by implication a legal power they could not convey the legal estate. The distinction, if it exists, is of no great importance, as the Court could under a vesting order perfect the conveyance to the purchaser of the entire estate.

The distinction formerly existing on this point between the Courts of Common Law and the Courts of Equity was of a very refined and artificial character. One can well understand that it was at first without legislation a great stretch of power on the part of Courts of Equity to hold that a charge for the payment of debts gave the executors an implied power to sell, but once it was so held, one would have supposed that a power to sell implied a power to convey the entire property in the thing sold.

In my view of the case it is not necessary to consider some of the other questions. I merely wish, without expressing any opinion one way or the other, not to commit myself to the views expressed, that the sections of the Revised Statute which have been referred to would apply to a case not of a devise to trustees, but to one where no devise at all was made of the land, but the Legislature most assuredly did not have it in their minds to deal with a state of things not likely to occur twice in fifty years, though possibly the language may, contrary to that intention, be capable of being construed to extend to such a case.

Entertaining the view that there must be a clearly expressed intention to charge the descended lands and that no such intention can be gathered from this will, I am compelled to differ from the other members of the court, and think the appeal should be allowed.

PATTERSON, J. A.—This case turns on the effect of section 19 of R. S. O. ch. 107, which follows section 16 of Lord St. Leonards' Act, 22 and 23 Vict. ch. 35.

The questions are, First, did the testator charge his estate or any specific portion thereof; or more properly, did he charge the land now in question with the payment of his debts?

Secondly, did he *not devise* the real estate charged as aforesaid in such terms as that his whole estate and interest therein became vested in any trustee or trustees?

If these questions are answered in the affirmative, it follows, in the language of sections 14 and 16, that the executor or executors for the time being had power "to raise *such debt* * * by a sale and absolute disposition, by public auction or private contract, of the said real estate or any part thereof."

As to the first point. The will, after the introductory clause, proceeds: "My will is: First, that my funeral charges and just debts shall be paid by my executors hereinafter named."

It is clear that although a general direction to pay debts will charge real as well as personal estate, yet the direction that the debts shall be paid by the executors would, as Mr. Scott pointed out, indicate the personal estate as the fund charged, and prevent this clause, if it had stood alone, from operating as a charge upon the realty. But the testator goes on to say: "The residue of my estate and property which shall not be required for the payment of my just debts, funeral charges, and the expenses attending the execution of this my will and the administration of my estate, I give and dispose of as follows, to wit:" Then making specific bequests of personalty and specific devises of realty, but not mentioning the land in question, and not inserting any general residuary devise.

These specific devises make it clear that the words "residue of my estate and property" were employed to cover real as well as personal estate; and the "residue" spoken of being that which should remain after payment of debts, &c., the intention that the charge was not to be confined to the personal estate is manifest. I see no reason to hold the charge confined to the estate specifically devised, whether real or personal, because if anything on the subject

is to be inferred from the specific devises, it would be rather that the undevised lands were intended to be exhausted before the specific devisees should be disappointed.

In the greater number of cases touching this topic the executors have been devisees either in trust or as beneficiaries. Some of those cases may be usefully referred to, as e. g. *Cook v. Dawson*, 29 Beav. 123; 3 D. F. & J. 127, and *Bailey v. Bailey*, 12 Ch. D. 268, and cases there cited by Fry, J., as shewing the extent to which, even when lands are devised to executors, the intention of the testator, to be gathered from the whole will, will be taken into account in deciding which of his lands are charged with his debts or legacies, and which left free.

In *Brooke v. Brooke*, 3 Ch. D. 630, the executors were not devisees. The debts and legacies were directed to be paid by the executors, and that direction was followed by a gift of the real and personal estate in one mass. The question arose respecting legacies; but when they are held to be charged the decision will equally, if not a fortiori apply to debts. Sir Geo. Jessel, M. R., said: "The rule is this: that if you give legacies generally, and then give the residue of the real and personal estate in one mass, that charges the legacies on the real estate. Here legacies are given generally, and then the residue of the real and personal estate is given in one mass; and it is not denied that that would charge the legacies on the residuary real estate, were it not said that a contrary intention is shewn by the direction that the legacies shall be paid by the executors who are not trustees of the will. It is to be observed, however, that the direction is, that the debts as well as legacies shall be paid by the executors; the testatrix could not, even if she wished it, have exempted her real estate from payment of debts; and that being so there is not in my opinion any indication of an intention to exempt it from payment of legacies."

The proposition that a direction that the debts of the testator shall be paid, without the designation of a specific fund for the purpose, and without the direction that they shall be paid by the executors, creates a charge upon the real estate undevised as well as devised, is not, as I appre-

hend, open to question. "I am clearly of opinion," said Sir R. P. Arden, in *Shallcross v. Finden*, 3 Ves. 739, "that whenever a testator says that his debts shall be paid, that will ride over every disposition, either against his heir-at-law or devisee." The direction that the debts shall be paid *by the executors* affects the construction only as evidencing the intention that they are to be paid out of the personal estate; but that evidence is met by the second clause of this will which shews that there is no intention to charge the personal estate alone; and that leaves the charge to take effect as it would have done without the aid of the second clause if the first had not mentioned the executors, upon the whole estate whether devised or undevised.

If the direction that the executors shall pay the debts had been accompanied by a devise of a portion of the real estate to the executors, as in *Cook v. Dawson*, the intention to charge the personal estate only would be rebutted, but the charge upon the realty might be limited to the portion devised to the executors, and thereby designated as applicable to the debts which the executors were to pay; but here the rebutting evidence is unaccompanied by anything calculated in my judgment, to exempt the undevised realty from the charge.

The first question is therefore, in my opinion, properly answered in the affirmative.

The second question touches the application of the 19th section, which governs cases in which "a testator who creates such a charge as is described in the 17th section, does not devise the real estate charged as aforesaid in such terms as that his whole estate and interest therein become vested in any trustee."

The argument for the appellant is, that this section deals only with land which is devised, though not for the whole estate and interest of the testator, and not with land which the will leaves undisposed of except by including it in the general charge of debts or legacies.

The ingenious construction of the section thus suggested has but faint support, if it is supported at all, by the literal force of the language, and is still further opposed to the

object of the Legislature. Land which is not devised at all is literally real estate which is not devised to a trustee for the testator's whole estate and interest therein.

Section 19 is the complement of section 17. The earlier section gives power to a trustee to whom the whole estate and interest in lands charged with debts or legacies is devised, to sell or mortgage the lands in order to satisfy the charge, and section 19 gives the power to the executors when there is no such trustee. Under one section or the other there is power given to some one to raise money by sale or mortgage of all real estate so charged, unless it happens to come within the exceptions contained in section 21, which cannot be asserted of the land now in question.

Mr. Moss argued that section 22, which is not taken from Lord St. Leonards' Act, might be used for the same purpose for which section 19 is relied on. I do not think so. It deals with cases where there is a *direction*, not a power, express or implied, to sell, &c. If it could be held to authorise executors to sell lands charged by implication with debts or legacies, or even expressly so charged, it would apply to those cases for which section 17 provides, in which the power is vested in the trustees, as well as to cases covered by, or supposed to be omitted from, section 19.

The statute has superseded the necessity of inquiring whether or not the executors would have had an implied power to sell from the circumstance that the debts were charged upon the real estate. Lord St. Leonards noted in the edition of the Vendors and Purchasers, published a couple of years before the passage of his Act, that *Robinson v. Lowater*, 17 Beav. 601, 5 De G. M. & G. 272, and *Wrigley v. Sykes*, 2 Jur. N. S. 79, (S. C. 20 Beav. 337), had introduced considerable difficulty upon titles by implying a power of sale in executors from a charge of debts, although the estate is devised to others; adding that that was contrary to the received opinion: *Sugd. V. & P.* 13th ed. 545: and he referred to an article in 2 Jur. N. S. pt. 2 p. 68, where there is a learned and able discussion of the law under those and the earlier decisions.

In later editions the same note appears, but with a reference to additional cases, and with the memorandum that the law is now made clear by 22 & 23 Vict. c. 35, secs. 14 to 18.

In 5 Jur. N. S. pt. 2 p. 439 (1859), there is a leading article upon Lord St. Leonards' Act which was then just passed. The writer, dealing with sections 14 to 18, (with which sections 17 to 21 of R. S. O. c. 107 correspond,) examines several decisions, including *Robinson v. Lowater*, *Wrigley v. Sykes*, and *Colyer v. Finch*, 5 H. L. Cas. 905, 923; and quotes Lord St. Leonards, where (in V. & P. 544) he lays it down that a devisee subject to the charge, though a trustee for others, may sell or mortgage, and give a good discharge for the purchase money, adding that "this point ought not to be open to doubt;" and then he remarks that these sections appear rather to be intended to settle the law in the sense in which the learned author of the measure understood it to stand than to introduce any new principle. Discussing the 18th section (= our section 21) the last clause of which, according to the *prima facie* meaning of its terms, would exclude the very case of a devise to trustee to which the 14th section is intended to apply, he says it is obvious that the words are to be understood only of a devise to a person or persons for his or their own benefit, an observation which though just and accurate, is foreign to our present purpose, but he makes a further comment on section 18, which shews that he reads section 16 (= our section 19) as applying to lands not devised by the will. His remark is, that the exceptions introduced by the 18th section seem to restrict the statutory power conferred on executors to cases in which the will either contains *no devise of the lands at all*, a devise not carrying the whole interest of the testator, or a devise creating several successive estates.

The second question can also, in my opinion, be only properly answered in the affirmative; and the only question that remains is whether the power was so exercised as to make a good title to the plaintiff.

Section 20 declares that purchasers or mortgagees shall

not be bound to inquire whether the powers conferred by sections 17, 18, and 19, of this Act, or any of them, have been duly and correctly exercised by the person or persons acting in virtue thereof.

The application of this section to the facts of the case before us has been discussed by the learned Chancellor, and I agree with his conclusion on this as well as on the other points.

I am of opinion that we should dismiss the appeal.

OSLER, J. A., agreed with the views expressed by his lordship the Chief Justice and by the Chancellor, and concurred in dismissing the appeal.

Appeal dismissed, with costs.

[BURTON, J.A., dissenting.

REGINA V. THE ST. CATHARINES MILLING AND LUMBER
COMPANY.

Indian lands—Public ungranted lands—B. N. A. Act, secs. 109, 117.

Held, [affirming the judgment of BOYD, C.], that lands ungranted upon which Indians have been accustomed to roam and live in their primitive state, form part of the public lands, and are under the B. N. A. Act, now held in the same manner by that Province in which such lands are situate as before the Confederation of the several Provinces.

THIS was an appeal by the defendants from the judgment of BOYD, C. (10 O. R. 196), and came on for hearing before this Court on the 10th, 11th, and 14th of December, 1885.*

McCarthy, Q. C., and *Creelman*, for the appellants.

Mowat, Attorney General, *W. Cassels*, Q. C., and *Mills*, for the Crown.

The circumstances out of which this action arose, the points relied on, and authorities cited by counsel, are fully stated in the former report of the case.

April 20, 1886. HAGARTY, C. J. O.—For a clear understanding of the case before us we are very much indebted to the learned Chancellor for the very clear, full, and well-arranged statement with which he prefaces his judgment. The field to be travelled over is necessarily very extensive. He has mapped it out with so much care and perspicacity as to very much reduce the labors of subsequent investigators. We may fully accept his historical treatment of the subject from the earliest period down to the Confederation Act of 1867. The review of the authorities as to the true nature and extent of the alleged "Indian Title" may well warrant our full acceptance of the conclusion at which the learned Chancellor has arrived on this important branch of the case.

**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, J.J.A.

We have then to consider the effect of the Confederation Act, and to glance at the existing position of the vast territories then moulded into a new constitutional form by Imperial legislation.

The north-western boundary of the Province of Ontario had not then been clearly ascertained, and it was not known whether the tract of country, which we may call the North West Angle, was or was not within Ontario. The Indian tribes were sparsely scattered over that region, and the rest of the northern continent to the Rocky Mountains. No surrender of Indian rights had been made, and according to the settled practice of the United Provinces of Canada, evidenced and sanctioned by repeated statutes, no attempt appears to have been made to grant titles or encourage settlement so long as the Indian claim was unextinguished.

We must except from this general statement any grants or titles from or under the Hudson's Bay Company.

The Confederation Act declares (sec. 6) that the part of Canada which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario.

Sec. 91. The Dominion Parliament may make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislature of the Provinces, and the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects thereafter enumerated. No. 24 of these reads—"Indians and Lands reserved for the Indians."

Sec. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects thereafter enumerated. No. 5—"The management and sale of the Public Lands belonging to the Province, and of the timber and wood thereon." No. 13. "Property and civil rights in the Provinces."

Sec. 109. All lands, mines, minerals and royalties belonging to the several Provinces * * * at the Union, and all sums then due or payable for such lands, mines, mine-

als or royalties shall belong to the several Provinces of * * * in which the same are situate or arise, subject to any trust existing in respect thereof, and to any interest other than that of the Province in the same.

Sec. 117. The several Provinces shall retain all their respective public property not otherwise disposed of by this Act, subject to the right of Canada to assume any lands and public property for fortifications or the defence of the country.

Schedules are attached to the Act as to provincial public works and property to be the property of Canada, such as canals, harbors, and including (No. 9) property transferred by the Imperial Government and known as Ordnance Property. No. 10. Armories, drill-sheds, etc., etc., and lands set apart for general public purposes. Another schedule specifies certain assets and properties which are to belong to Quebec and Ontario jointly.

Reference is made to these schedules to shew the particularity with which the disposition of property was dealt with, and the improbability of any rights to extensive properties being omitted.

In considering the effect to be given to the claim of Ontario to these lands surrendered at Confederation to be part of the public domain, it may be well to refer to certain references in our statutes. In 1839 an Upper Canada Act, 2 Vict. ch. 15, was passed as to trespassing on lands of the Crown, and allowing proceedings against persons illegally possessing themselves of any of the ungranted lands or lands appropriated for the residence of Indians, and to lands for the cession of which to Her Majesty no agreement had been made with the tribes occupying the same. and who may claim title thereto.

12 Vict. ch. 9, (Canada,) 1849, declaring as to the foregoing Act, that it was to extend to all lands in that part of this Province called Upper Canada, whether surveyed or unsurveyed, etc., and whether such lands be part of those usually known as Crown Reserves, Clergy Reserves, School Lands, or Indian Lands, &c., whether held in trust for the use of

the Indians or of any other parties, &c., and it expressly repeals any limitation in the first section of the Act of 1839.

1860—23 Vict. ch. 2, sec. 28—"The term 'Public Lands' shall be held to apply to lands heretofore designated or known as Crown Lands, School Lands, Clergy Lands, Ordnance Lands (transferred to the Province), which designation, for the purposes of administration, shall still continue."

Sec. 9 allows the Governor-General to declare the provisions of the Act, or any of them, to apply to "the Indian Lands under the management of the Chief Superintendent of Indian Affairs," and the Chief Superintendent shall, in respect to said Indian lands, have the same power as the Commissioner of Crown Lands has in respect to Crown Lands. In former Acts, such as C. S. C., ch. 23, sec. 7, as to trespassers, the expression is "Crown, Clergy, School or other Public Lands." In a Public Land Act of 1849, 12 Vict. ch. 31, sec. 2, as to the effect of a receipt for purchase money from the Commissioner of Crown Lands, it is enacted that it shall extend to "sales of Clergy Reserves, Crown Reserves, School Lands, and generally to sales of all lands of what nature, kind, or description soever of which the legal estate is or shall be in the Crown, and the sale thereof is or shall be made by any department of the Government or any officer thereof, for or on behalf of Her Majesty, whether such land be held by Her Majesty for the public uses of the Province, or in the nature of a trust for some charitable or other public purpose." These latter words are omitted in the next Land Act, 16 Vict. In the session of 1860 was passed 23 Vict. 151, (reserved Act)—It declared that the Commissioner of Crown Lands should be Chief Superintendent of Indian Affairs.

Sec. 2. All lands reserved for Indians, or for any tribe or band of Indians, or held in trust for their benefit, should be deemed to be reserved for the same purposes as before the Act, but subject to its provisions.

Sec. 3. All moneys or securities applicable to the support or benefit of the Indians, &c., and all moneys accrued, or hereafter to accrue from the sale of any lands reserved or held in trust as aforesaid, shall, subject to the provisions of this Act, be applicable to the same purposes, and be dealt with in the same manner as they might have been applied or dealt with before this Act.

Sec. 4 declared that no release or surrender of lands reserved for the use of Indians, &c., shall be valid except assented to by the chiefs (as directed) at a meeting in presence of an officer, duly authorised to attend by the Commissioner of Crown Lands, to be duly certified and returned to the Commissioner of Crown Lands.

Sec. 6. Nothing in the Act is to make valid any release or surrender other than to the Crown.

Sec. 7 allows the Governor-General to declare the provisions of 23 Vict. ch. 2, or ch. 23 C. S. C., as to sale and management of timber on public lands, to apply to Indian lands, or to the timber on Indian lands.

Sec. 8. He may also direct how, and in what manner, and by whom the money from sales of Indian lands, and from the property held or to be held in trust for the Indians, shall be invested, &c., and for the general management of such lands and moneys, and to set apart therefrom, for the construction or repair of roads passing through such lands, and by way of contribution to schools frequented by such Indians.

We may refer to these Acts as shewing the state of the law at Confederation.

Much has been changed by Dominion legislation since that period.

The subsequent Dominion legislation may be referred to as indicative of the views of the framers of the statutes.

In 1868, the 31 Vict. ch. 42, (D.), substitutes the Secretary of State as Superintendent General of Indian Affairs, and the learned Chancellor points out the language in which "lands reserved for Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purpose

as before this Act, and no such lands shall be sold, alienated, or leased until they have been released or surrendered to the Crown."

The act of 1870, 33 Vict. ch. 3, (D.), establishing the Province of Manitoba was passed before any treaty was effected with the Indians for that portion of the North West. It provides that after the transfer by the Queen's Proclamation of Rupert's Land, and the North West Territory to Canada, (which was dated 23rd June, 1870,) the new Province shall be formed.

Sec. 30 declares that all ungranted or waste lands in the Province shall be vested in the Crown and administered by the Government of Canada, &c.

Sec. 31 declares that towards the extinguishment of the Indian title to lands in the Province, the Lieutenant-Governor might select lots or tracts to the extent of 1,400,000 acres for the half-breed residents.

Sec. 32. And that all grants by the Hudson's Bay Company in freehold should be confirmed, and all persons in peaceable possession of tracts of lands at the time of the transfer in those parts of the Province in which the Indian title had not been extinguished, should have the right of preemption thereto, &c.

By the terms of the arrangement with the Hudson's Bay Company large quantities of land had been declared by the Imperial and Dominion authorities to be the company's property absolutely. I refer to this statute, and to these arrangements, as a noteworthy commentary on some of the arguments addressed to us as to the extent of the alleged "Indian Title" to all unsurrendered lands. The treaties with the Indians affecting this part of the North West were in 1871. But the Act passed prior to the treaty specifically appropriates large tracts of land.

The Chancellor properly refers to the Dominion Act of 1876, as to the definition of "Reserve" declared by sub. 6, sec. 3, to mean any tracts of land "set apart by treaty or otherwise for the use or benefit of, or granted to a particu-

lar band of Indians of which the legal title is in the Crown but which is unsurrendered."

Sub.-sec. 8. The term "Indian Lands" means any reserve or portion of a reserve which has been surrendered to the Crown.

These definitions are repeated in 1880, 43 Vict. ch. 38, D.

I think the Chancellor has placed the right interpretation on the words in the British North America Act. "Indians and lands reserved for the Indians." They cannot, in my judgment, be held to embrace the enormous territories then lying beyond the settled or surveyed lands of Ontario. I adopt the language of the judgment appealed from on this head, and consider that the whole course of Canadian legislation, both before and after Confederation, has stamped a definite meaning on the words "Indian Reserves" or "lands reserved for Indians." That, in effect, such words do not cover lands which have never been the subject of treaty or surrender, and as to which the Legislature or executive Government have never specifically appropriated or "reserved" for the Indian population.

The Confederation Act professed only to unite the then Provinces of Canada, Nova Scotia, and New Brunswick, in a federal union, "with provision for the eventual union of other parts of British America." The territory embraced within the boundaries of these Provinces we may consider as alone affected by the special provisions in the Act for the appropriation and division of property. The territory in this North West Angle, was at that time unsurveyed and its legal boundary unascertained. It was eventually found to be within the Province of Ontario, representing the old Upper Canada. The well understood "Indian title" had never been surrendered, and no part of it, as far as I can understand from the evidence, had been treated as "reserved" for special Indian use or purpose. Territorially it was of course part of Ontario.

The main contest before us is, whether it did not thereby become part of the public domain of Ontario. The appellants have to contend, as they do, that inasmuch as the In-

dian title had never been extinguished it still remained excluded from the dominion of Ontario, and could only be dealt with or disposed of by the Federal Government—that it did not form part of the “public lands belonging to Ontario.” The consequences would be, that it remained the property of the Dominion—that that power alone could grant any portion of the soil or timber, and it must be at its pleasure when or at what date, if ever, the Indian title should be extinguished by its action, and the same result would follow, if at the time of Confederation one-half or more of the Province of Ontario, clearly within its boundaries, had remained with the alleged Indian title unsurrendered. Difficulties may be suggested and may arise whichever of the opposing contentions may govern our decision. I do not propose to consider them further than the decision of the point in controversy requires.

If these lands passed under the British North America Act to Ontario, our decision must be against this appeal. It is not sufficient to hold that without this Act the lands in question in 1867 fall properly within the designation of “Public Lands” as such words are used in some of our statutes. We must take the whole Act together and ascertain as far as we can from its whole scope and bearing how far it decides this controversy. The sub-sec. 5, already quoted, must be read with sec. 109 as to “lands, mines, minerals, and royalties.” And sec. 117 as to the Provinces retaining “all their respective public property not otherwise disposed of by this Act, subject to the right of Canada to assume any lands or public property for fortifications,” &c. As to the words in sect. 109, “subject to any trusts existing in respect thereof and to any interest other than that of the Provinces in the same,” they do not in my opinion help the appellants. I cannot hold that any trust or interest in the legal sense in which we are bound to regard them, can be said to have then existed or affected these lands, as waste lands of the Crown. We are not called on to decide whether Ontario could or could not before the extinguishment of the alleged Indian title, enter upon or sell these lands.

The treaty of 1873 has settled that matter. In the *Attorney-General v. Mercer* (8 App. Cas. 770) Lord Selborne says : "The fact that exclusive powers of legislation were given to the Provinces as to the management and sale of the public lands belonging to the Province would still leave it necessary to resort to sec. 109 in order to determine what those public lands were." He cites sec. 109, and discussing what "lands" are meant he says : "They evidently mean lands, &c., which were at the time of the Union in some sense and to some extent publici juris," and in this respect they receive illustration from another section 117—"The several Provinces shall retain all their respective public property not otherwise disposed of by this Act subject to the right of Canada to assume any *lands or public property* required for fortifications, &c. * * It was not disputed on the argument for the Dominion at the bar, that all territorial revenues arising within each Province from 'lands' (in which term must be comprehended all estates in land) which at the time of the Union belonged to the Crown were reserved to the respective Provinces by sec. 109, and it was admitted that no distinction could in that respect be made between Crown Lands then ungranted and lands that had previously reverted to the Crown by escheat."

Again in reference to 109 he says—"The general subject of the whole section is of a high political nature, it is the attribution of royal territorial rights for purposes of revenue and government to the Provinces in which they are situated or arise. It is a sound maxim of law that every word ought to, *primâ facie*, be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context."

I think the general scope of Lord Selborne's remarks strongly favor the opinion that the whole effect of the Act was to vest the ungranted lands of the Crown within the bounds of Ontario in the ownership of that province, and that no sound reason exists for exempting the unsundered lands over which the very sparse Indian population was scattered.

Assuming that the treaty-making power rests wholly with the Dominion Government, and for the purposes of this case only, assuming that the appellants are right in asserting that until the Indian claims be extinguished the territory cannot properly be entered upon or occupied under either government, I still feel great difficulty in agreeing that when the extinguishment takes place the territory and its timber remain, or rather become, the property of the Dominion. Believing, as I have stated, that the Union Act declared that all within the territorial limits of Ontario become the property of this Province subject to any trust, &c., I feel myself forced to the conclusion that when the Dominion Government in 1873 extinguished the Indian claims, such action must be held to enure to the benefit of the Province in which is the legal ownership of the land thus relieved from an alleged burden.

The Confederation Act and subsequent Imperial legislation left the general Government of Canada in full possession of the immense North-West territories. It left each Province in the legal ownership of all the territory comprised within its limits, with certain carefully specified exceptions. The Indian treaty of 1873 extended over part of Ontario as well as a large part of territory not included in any existing Province. Unfortunately at that time the true boundaries had not been ascertained. Had it been otherwise we might naturally suppose that some understanding would have existed between the local and the general Governments as to a distribution of the burden undertaken by the latter in extinguishing the Indian claims. But I cannot see how the absence of any such provision can alter the legal result.

If I hold otherwise I must decide that the fact of a burden, less or greater, being undertaken, necessarily affects the title to the released territory. If, as has occurred before in Indian treaties, the bargain had been that the Indians should remove altogether from the North West Angle to other lands assigned to them in the more distant

regions, the argument would be equally strong for declaring the surrendered lands to remain for ever in the hands of the general Government, although an integral part of Ontario, and wholly freed from the presence of a single Indian. I think we must assume, under the known uncertainty as to true boundaries, that the treaty was made by the Dominion as it were, "for the benefit of all concerned."

I cannot consider that we are dealing with the case of two rival claimants for the separate beneficial enjoyment of a valuable estate. I look upon the position of the Federal Government, in a case like this, as that of a power intrusted with large legislative authorities to be exercised, so far as the Provinces are concerned, for their general benefit. If any Province had a portion of its territory, as fixed by the paramount authority of the Union Act, incumbered or embarrassed by an Indian claim, it would be, I assume, the duty of the Federal Government to endeavour to relieve it therefrom. The omission to make some provision for a fair share of the cost or burden, cannot, I think, affect the question.

The peculiar facts of this case suggest it as one eminently calling for some amicable arrangement in view of the great public interests. I do not underrate the difficulties presented by these facts. The treaty seems clearly to have been made on the assumption that the Dominion had the whole control of the surrendered territory. For example, we find a clause by which (p. 323 App.) Her Majesty agrees that the Indians shall have the right to hunt and fish over the tract surrendered, subject to such regulations as may from time to time be made by the Dominion Government except over such tracts, &c., required for settlement, &c., by the Government, or by her subjects duly authorized by such Government.

This latter clause could, I presume, be carried out in good faith by arrangement between the two Governments. I think the appeal must be dismissed.

BURTON, J. A.—The case, when we come to understand the facts, does not present any very formidable difficulties, although a perusal of the reasons for and against the appeal, and the numerous authorities cited in them, might well impress one at first with the idea that it was beset with intricacies and complications. It is a case in which we are again called upon to place a construction upon the British North America Act, but the first objection of the learned counsel for the appellants is a very startling one, viz : That the Act can have no application to the lands in question, inasmuch as at the time of Confederation the title to them was in the Indians, and that it consequently could not pass under the Act which professed to deal only with the lands which were the property of the former Provinces. In other words that a tract of country of over one hundred thousand square miles in extent, about one-half of which by the recent decision of the Privy Council was held to be within the confines of Ontario, and which was supposed hitherto to belong to the Provinces of Ontario and Quebec, was owned by the small body of Indians, less than four thousand in number, who were roaming over it at large in their primitive state, and occupying it merely as hunting or fishing grounds.

It would require very strong authority to induce any Court to come to such a conclusion, and whatever dicta there may be in American text books or decisions in support of such a view, I think it is the first time that such a contention has been urged in a British Court of Justice. Nor do I think the decisions in the United States warrant any such conclusion. It was stated in *Fletcher v. Peck* arguendo, 6 Cranch 87, (Feb. 1810,) that the Indian title was a mere occupancy for the purpose of hunting. It is not like our tenure, they have no idea of a title to the soil itself. It is over-run by them rather than inhabited : citing *Vattel*, ch. 1, secs. 81 and 209, bk. 2 sec. 97; *Montesquieu*, bk. 18, ch. 18; *Smith's Wealth of Nations*, bk. 5 ch. 1. It is a right not to be transferred but extinguished. And Marshall, C. J., in delivering judgment, refers to the question

merely in this way: "The Court is of opinion that the nature of the Indian title, which is certainly to be respected by all Courts until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State." And in 1823, the same eminent Judge again discusses the question in an able and exhaustive judgment from which the learned Chancellor has made some extracts.

The whole discussion and judgment in that case are very interesting and instructive. Counsel referred to the practice of all civilized nations to deny the right of the Indians to be considered as independent communities having a permanent property in the soil. And it was said in argument that the North American Indians could have acquired no proprietary interest in the vast tract of territory which they wandered over, and their right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it; the use in the one case as in the other, is not exclusive. According to every theory of property the Indians had no individual right to the land; nor had they any collectively, or in their national capacity, for the lands used by each tribe were not used by them in such manner as to prevent their being appropriated by settlers.

The learned Judge in the course of his able judgment referred to the exclusive power of the Crown to grant lands, though in the occupation of the Indians before the Revolution as being undoubted, and then adds: "The existence of the power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist at the same time in different persons or in different Governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." I am aware that there are to be found in some

of the United States decisions expressions which would seem to place the so-called Indian title on a higher footing, but I think that it is met by the extract I have made from Chief Justice Marshall's judgment "that an absolute title cannot exist at one and the same time in different persons or in different Governments," and that in truth the recognition of any right in the Indians has been on the part of the Government a matter of public policy determined by political considerations, and motives of prudence or humanity, and has not been a recognition of property in the soil capable of being transferred. That has always been the view taken of their rights in this country, and so far back as 1858 the late Sir John Robinson, in giving judgment in *Totten v. Watson*, very clearly enunciates the opinion that the Indians had no title even as regards *the lands reserved for them*, and which, as he expresses, "they are merely permitted to occupy at the pleasure of the Crown;" 15 U. C. R. 392,

Mr McCarthy contended that the principles upon which the Crown had been accustomed to deal with the Indians since the cession had been so well established, and so uniformly and continuously exercised as to have grown into a right. There is no question that the same humane policy which the Imperial Government pursued in reference to them has been faithfully observed by the old Province of Canada from the time that the jurisdiction passed to them, and I have no doubt will still be continued whether the jurisdiction be with the Provinces or the Dominion. All that we are at present concerned with is, that this right, whatever it may be, is not a title to the land, and that by the 109th section of the British North America Act, the lands being within the limits of that portion of the old Province of Canada which now constitutes the Province of Ontario, belong to that Province, subject to any trusts at the time of the passing of the Act existing in respect thereof and to any interest other than that of the Province to the same. Sec. 109 became necessary in consequence of Ontario and Quebec having previously to Confederation formed but

one Province, and on their becoming disunited it became necessary to assign to each the property each should have. Apart from this, the plain and obvious intent and spirit of the Act is, that all lands situate within a Province continued to belong to the Province, with the exception of those which were specifically transferred to the Dominion and set forth in a schedule, and, as if to place this beyond all question, Section 117 declares that the several Provinces shall retain all their respective public property not otherwise disposed of in the Act, subject to the right of the Dominion to assume any lands or public property required for fortifications or the defence of the country.

Mr. McCarthy further contended that they did not pass to the Province, inasmuch as they were "Lands reserved for Indians as described in sub-sec. 24 of sec. 91," and so became the property of the Dominion, and that up to the time of the making of Treaty No. 3, it was clear that neither the Executive nor Legislature of the Province had any power to deal with them; and that the Governor-General could alone represent the Crown in treating with the Indians, and could alone accept a surrender from them. I am not prepared to accede to either proposition. It by no means follows that because exclusive jurisdiction to legislate in reference to property—the subject matter of sec. 91—is given by that sec., to the Parliament of Canada, the property itself should vest in the Dominion. On the contrary Parliament, as I have already pointed out, has clearly and specifically defined what property shall go to the Dominion, and "lands reserved for Indians" are not in the schedule so defining it. But the first proposition seems to assume the whole question in controversy, viz., what is meant by the words "Lands reserved for Indians."

I certainly should not have thought of resorting to the Proclamation of 1763 for the definition of the words in question, which at the time of Confederation had acquired a well understood meaning which had been repeatedly recognized in the statutes and public documents of the Provinces, and in the first Act passed by the Dominion

Parliament upon the subject, they treated their jurisdiction as confined to such lands as had been reserved for Indians, or for any tribe, band or body of Indians or held in trust for their benefit, and eight years subsequently when they consolidated the laws respecting Indians, they passed interpretation clauses in which the terms "Reserve" and "Special Reserve," and "Indian lands" are thus clearly defined, viz :

(6) The term "Reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein.

(7) The term "Special Reserve" means any tract or tracts of land, and everything belonging thereto set apart for the use or benefit of any band or irregular band of Indians, the title of which is vested in a society, corporation or community legally established, and capable of suing and being sued, or in a person or persons of European descent, but which land is held in trust for or benevolently allowed to be used by such band or irregular band of Indians.

(8) The term "Indian Lands" means any reserve or portion of a reserve which has been surrendered to the Crown, indicating very clearly that the Government and Parliament of the Dominion adopted the construction which had always been attributed to the words in the Provinces, and their own construction of the language of the Imperial Act.

But I understand the learned counsel for the appellants to push his argument to the extent of saying that the Imperial authorities kept so jealous a control over the Indians and their affairs, that they would not have entrusted the Provinces with the power of treating for the extinguishment of their rights. The best answer to that argument is, that many years before Confederation those authorities had handed over the control of the Indians to the Provinces, and that the division of the Dominion and

Provincial powers was settled by delegates from the several Provinces, the Imperial Parliament having little more to do with the matter than to give legal effect to the agreement then arrived at by the delegates. The main feature of the scheme of division being to give to the Dominion power to legislate upon subjects of national interest, or matters common to all the Provinces, and to the Provinces power to deal with matters of a local or private nature. It was reasonable, therefore, that the power to legislate for Indians generally throughout the Dominion should be vested in the central authority, and that the same power should deal with the lands which the Provinces had reserved or set apart for them, but this power was expressly limited to such subjects. It would have been very unlikely that the delegates would have consented to place the power of legislation in reference to the large unorganised tracts of public lands like that in question in the hands of the Dominion. If then the lands in question passed, or to speak more accurately remained part of the Province of Ontario, it would seem to follow almost as of course that the Provincial and not the Dominion authorities were the parties and the only parties who could extinguish the so-called Indian title in the absence of any express power to the Dominion to deal with it. We were referred to the case of *Lenoir v. Ritchie*, 3 S.C.R. 376—more commonly known as the Great Seal case—as authority against the Lieutenant-Governor of a Province having power to deal with such a matter on behalf of Her Majesty. Whenever a case involving the grave issues which were presented for decision in that proceeding comes before us under similar circumstances we shall be bound to follow that decision, but I must respectfully decline to adopt the views expressed by some of the Judges in that case as to the limited powers of the Lieutenant Governors and of the Legislatures of the Provinces.

It was intended that each of the Provinces at the time of Confederation should stand upon the same footing as to constitutional and proprietary rights.

The 12th sec. provides that all the powers, authorities

and functions which under any Act of Parliament were vested in or exercisable by the respective Governors, or Lieutenant Governors, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in or exercisable by the Governor General, while the 65th sec. vests the same powers in the Lieutenant Governors of Ontario and Quebec as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec, as were formerly exercised by the Governor General. This became necessary, as before Confederation the Province of Canada (now Ontario and Quebec) formed only one Province, presided over not by Lieutenant Governors but by the Governor General. But as respects New Brunswick, and Nova Scotia, by the 64th sec. the Provincial constitutions were continued. In other words, whatever powers might have been exercised by any Governor fell to the Governor General of the Dominion *if the subject matter related to the Dominion of Canada*, and fell to the Lieutenant Governor if the matter related to the Province.

If it had not been for the expression to be found in some judicial utterances placing within very narrow limits the powers of the executive of the Provinces, I should have thought it too clear for argument, that the powers formerly exercised by the Lieutenant Governors of the other Provinces, and by the Governor General of Canada in reference to provincial matters, including agreements or so-called treaties with the Indians for the extinguishment of their rights, and granting to them in lieu thereof certain reserves either for occupation or for sale, were now vested exclusively in the Lieutenant Governors. The view that has been sometimes expressed that they do not represent Her Majesty for any purpose, appears to me to be founded on a fallacy, and to be taking altogether too narrow a view of an Act, which is not to be construed like an ordinary Act of Parliament, but as pointed out in the *Queen v. Hodge*, is to be interpreted in a broad, liberal, and quasi political sense.

It is obvious that as the public lands are vested in the Queen, the Lieutenant Governor must have the power, in Her Majesty's name, to grant the same, or they cannot be granted at all, for the Governor General clearly has no such power, and it has always been assumed, without any express provision in the statute for making such grants in Her Majesty's name, that the power is vested in the Lieutenant Governor. There are several clauses of the British North America Act in which his power to act in the name of the Queen is expressly recognised, as for instance: section 82, which empowers him in the Queen's name to summon the Legislature: in sec. 72 the Lieutenant Governor of Quebec is authorized to appoint legislative councillors in the Queen's name; and the Provincial Legislatures create Her Majesty's courts of civil and criminal jurisdiction, the writs in which are issued in Her Majesty's name. And this view appears to have received the direct confirmation of the Privy Council in *Theberge v. Laudry*, in which the Judicial Committee refer to an Act of the Provincial Legislature (2 App. Cas. 108) as having been assented to on the part of the Crown, and to which therefore the Crown was a party. If then it is within the competency of the Legislature of Ontario to legislate for the management and sale of these lands as being public lands belonging to the Province, it would follow that they have the minor power of empowering the executive to make any agreement for the extinguishment of the so-called Indian right. And I am of opinion therefore that there is no force in the learned counsel's objection that the Governor General could alone, as the representative of Her Majesty, accept a surrender of that right from the Indians.

Another reason for assuming that the Provincial authorities are the proper parties to deal with it arises from the consideration that in the event of the tribes ceasing to exist, the lands which have been reserved to them, to use Sir John Robinson's language, "for occupation at the pleasure of the Crown," would revert to the Province. Although when once reserved the Dominion Parliament

has alone power to deal with their management, it could scarcely have been in the contemplation of Parliament that the Dominion should prescribe to the Provinces the extent or nature of the reserves.

The Dominion authorities assumed to make the treaty in question under the mistaken belief that the lands were beyond the confines of the Province and were consequently Dominion lands, which will account for the reservation of the right to the Indians still to occupy the vast tract outside their actual reserve for hunting and fishing until granted to settlers by the Dominion Government; which if the treaty is to be adopted in its integrity, would mean for all time to come, as the Dominion Government have no power to make such grants. Even if I did not think the language of the British North America Act, which I have quoted, clearly conferred upon the Provincial authorities the power to extinguish the Indian title, the same reasoning which compelled us to hold in *Leprehon v. Ottawa*, 2 A.R. 522, that the local Legislature had no power to tax the official income of a Dominion officer for Provincial or Municipal purposes, would compel us, in my opinion, to hold that the local Governments alone must be the judges of the extent to which lands belonging to them shall be set apart for the use or benefit of any tribe of Indians. If the Dominion Government have the power, being in its nature unlimited, it might, as was pointed out in that case, be so used as to defeat the Provincial power and control over these lands altogether.

In the view which I take of the whole case it was not necessary to consider the question I have lastly discussed, but I thought it due to Mr. McCarthy to let him see that his argument was not overlooked, and I also desired to record my dissent from the view expressed by the Chief Justice upon this part of the case. If, however, the lands were public lands which passed or remained with the Province, subject to the rights which the Indians might possess, as in my opinion they were, it is clear that the claim of the Dominion to authorise the cutting of the timber cannot be

sustained, and the judgment appealed from should consequently be affirmed.

PATTERSON, J. A.—The discussion of this appeal has ranged over a rather wide field, and we have had the benefit of much learning and historical research, for which we are indebted to the industry of counsel on both sides ; but I have not been convinced that the learned Chancellor erred in his construction of the provisions of the British North America Act on which the question of property has to be decided. Two leading propositions were insisted on for the appellants, as Mr McCarthy reminded us in his reply : First, that the lands in question are not lands in the sense intended in section 109, or public property of the kind mentioned in section 108, but are of the nature of private property ; and secondly, that if this should be otherwise decided, they still passed to the Dominion as “lands reserved for Indians,” described in article 24 of sec. 91. The contest has turned to a great extent upon the second proposition, the effort on the part of the appellants being to establish that lands which had not been the subject of a treaty with the Indians, but over which they had always been allowed to hunt and fish without molestation, were “lands reserved for Indians” within the meaning of section 91 ; while it is insisted for the Crown that the phrase is employed to denote a class of lands well known as Indian Reserves, and being tracts of lands set apart by treaties for the use of certain tribes or bands, and reserved from the ordinary course of settlement ; but it can scarcely be said that each proposition was discussed by itself, and there is no good reason for attempting to consider them separately even if it were practicable to do so.

I shall not attempt to follow the course of the arguments to which we have listened, or to deal with the historical evidence touching the recognition or disregard by European powers of the rights of the natives of the countries they discovered or conquered or seized on this continent, to which counsel on both sides appealed in aid of the views

they advocated. I have not failed to consider it attentively, and I am satisfied that to discuss it at any length would be only to traverse the same ground which has been gone over by the learned Chancellor in his very able and perspicuous judgment, without adding anything of importance to what he has said.

The general result of the historical evidence is, I think, as correctly and as concisely stated in *Story's Commentaries* on the Constitution of the United States as in any other work. I quote from section 6, of the author's abridged edition of 1833: "It may be asked, what was the effect of this principle of discovery in respect to the rights of the natives themselves. In the view of the Europeans it created a peculiar relation between themselves and the aboriginal inhabitants. The latter were admitted to possess a right of occupancy or use in the soil, which was subordinate to the ultimate dominion of the discoverers. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion. In a certain sense they were permitted to exercise rights of sovereignty over it. They might sell or transfer it to the sovereign who discovered it, but they were denied authority to dispose of it to any other persons, and, until such a sale or transfer, they were generally permitted to occupy it as sovereigns *de facto*. But notwithstanding this occupancy, the European discoverers claimed and exercised the right to grant the soil while yet in the possession of the natives, subject, however, to their right of occupancy; and the title so granted was universally admitted to convey a sufficient title in the soil to the grantees in perfect dominion, or, as it is sometimes expressed in treaties of public law, it was a transfer of *plenum et utile dominium*." This view is evidently that of the Parliament of Canada as may be gathered from the Indian Act, 1880, where "Reserve" is defined as "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of

or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered."

I start therefore with the proposition that the title to all these Indian lands, even before what is called the surrender by the Indians, is in the Crown, without attempting by any argument of my own to prove its correctness; and shall content myself with making a few observations, chiefly concerning the effect of the British North America Act as it strikes me.

The British North America Act when it established the Dominion of Canada by the union of the four Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, had to provide for two great subjects, viz., the constitution, including the legislative powers, of each Province, and of the Dominion, and the ownership of the public assets or property of every kind, besides other subsidiary matters.

The division of the Act numbered VIII, and including sections 102 to 126, is headed "Revenues, Debts, Assets, Taxation."

Section 108 declares that the public works and property of each Province enumerated in the third schedule to the Act shall be the property of Canada. From reading this schedule along with section 91, it is evident that in the scheme of the Act, the vesting of property in the Dominion as against the Provinces was not intended to follow or to be inferred merely from the bestowal of exclusive legislative jurisdiction over the subjects with which the property was connected. Thus while exclusive legislative power is given over: (5) Postal Service; (7) Militia, Military, and Naval Service and Defence; (9) Beacons, Buoys, Lighthouses, and Sable Island; (10) Navigation and Shipping; the schedule expressly enumerates Post-offices, Ordnance property, Armories, Drill-sheds, &c.; Lighthouses, Piers, and Sable Island; Harbors, River and Lake improvements, &c., there is, however, nothing answering in the schedule to the "lands reserved for Indians" over which by article 24 of section 91, the Parliament has exclusive legislative jurisdiction.

Therefore to argue that lands reserved for Indians become, by force of the British North America Act, the property of the Dominion as against the Provinces in which the reserves are situated, is, in my judgment, to attribute to section 91 an effect not contemplated or intended by the framers of the Act, and certainly not the necessary result of the language of the section. The question of the ultimate ownership, as between the Dominion and the Provinces, of the ordinary Indian reservation may not be too speculative a question for discussion. It would become a practical question in the event of any such land ceasing to be required for the occupation of the tribe, or for application by way of sale or lease for its benefit, and falling in, as it were, for ordinary public uses; and it might become a practical question if it were attempted to dispose of the land or the timber on it for other uses than the benefit of the Indians. It does not at present appear to raise except on the assumption that the lands reserved for Indians, mentioned in section 91, include not only tracts within the definition of "Reserve" in the Indian Act, 1880, but also such lands as those which are the subject of this litigation.

It does not strike me as being involved in the circumstance that the administration of the reserves belongs to the Dominion Government. The administrative and the legislative functions I take to be made co-extensive by the Act, as indicated by, *inter alia*, section 130. Nor is the fact that, as part of the administration of Indian Affairs, the Dominion Government has made sales or carried out, by granting patents, sales already made for the benefit of the Indians of portions of the reserves, inconsistent with the ultimate ownership of the lands by the Provinces. The title is in the Crown, and the patent, whether issued by the Government of the Dominion or by that of a Province, is a grant from the Crown. If the lands should cease to be held for an Indian tribe or band, by reason of the tribe or band ceasing to exist or for any other reason, the question between the Dominion and the Provinces may have to be decided.

I am strongly inclined to the opinion that the lands reserved for Indians mentioned in section 91, whatever that term includes, are not vested in the Dominion for any purpose except legislation and administration on behalf of the Indians; but I do not discuss that question more fully because I hold, with the learned Chancellor, that the lands with which we are concerned are not touched by the section.

The title of the Province to the lands in question is in my opinion established by the direct force of sections 109 and 117. By section 109 all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the Union, were to belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same were situate or should arise, subject to any trust existing in respect thereof, and to any interest other than that of the Province in the same; and section 117 declares that the several Provinces shall retain all their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications, or for the defence of the country.

To take the lands in question out of the operation of the extremely comprehensive effect of these sections, it is essential to establish one of two things: either that by some other provision of the Act they were assigned to the Dominion, or that they were private property of the Indians. The only other provision of the Act on which an argument can be based is section 91. I have made all the remarks I think necessary with regard to it.

The contention that the lands belonged to the Indians in any sense which deprived them of the character of lands belonging to the Province, or public property of the province, is answered by the extract I have read from *Story* on the Constitution, and by the judgment of the learned Chancellor to which, as I have said, I do not propose to add anything on this point.

The action of the Dominion Government in procuring the extinguishment of the Indian title does not, in my view, in any way affect the legal question which is before us. The defendants assert a right to cut timber on the lands by virtue of a license from the Dominion Government, which is not pretended to have been given in the course of the administration of Indian affairs, or in dealing with lands reserved for Indians, but was admittedly given as a means of producing revenue for the general purposes of the Government. If the lands were, as I hold they were, assigned to the Province, subject to whatever rights the Indians had in them, the Province must have the right to interfere to prevent the spoliation of the lands, whether the Indians retain or have surrendered their title.

Other matters connected with the surrender of the Indian title were referred to at the bar, and from reading the treaty of the North West Angle and the history of the negotiations in the volume published by the Hon. Mr. Morris, we see that certain outlay was incurred and certain burdens assumed by the Government. Of these things I can say no more than that they seem to me to leave the legal question untouched. Whether they give rise to any claims or equities between the Dominion and the Province is a matter of policy as to which we have no information, and with which we are not concerned beyond the one question of the effect on the right to the timber.

I agree that we must dismiss the appeal.

OSLER, J. A.—I am satisfied to affirm the learned Chancellor's judgment for the reasons stated therein, and in the judgment of the learned Chief Justice which I have had an opportunity of reading.

answered by the argument that the defendants being wrongdoers cannot be heard urging that their wrongful act has brought advantage to the claimant; that they have no right to claim, as it were, indemnity from any fund or property falling to the parties claiming in the event of the death, and I am asked if the damage was proved to amount to £5000 by the loss to the child from the parent's death, but if consequent thereon the child became entitled to £10,000, the amount gained beyond the loss should be for the benefit of the wrong doing company.

I must say, with submission, that all these suggestions seem to me to be wholly beside the question for decision.

We are dealing with a new remedy, specially created to meet a special case; that is loss occasioned by and arising from a named event.

If that event has occasioned no pecuniary loss, but has in fact largely profited the person claiming the benefit of the statute the claim should fail. The loss is the whole groundwork of the claim, and in that view, it appears to me immaterial that the act causing the death was wrongful.

The Legislature, in effect, say to a railway company "If you by your wrongful neglect cause the death of any person we direct that you must pay to his widow and children &c., the pecuniary injury or loss sustained by them by reason of such death," as is said by Grove, J., in *Bradshaw v. Lancashire and Yorkshire R. W. Co.*, L. R. 10 C. P. 192, "The intention of the Act was to give the personal representative a right to recover compensation as a trustee for children and relatives left in a worse pecuniary position by reason of the injured person's death."

I am of opinion on the reason of the thing and the authorities binding upon us that the actual loss or injury resulting from the death can alone be recovered, and if a large increase of fortune accrues to the plaintiff as the result of such death it must be taken into account in the estimate.

Property or money falling to a plaintiff as the legal result of the death whether it be under a settlement, or in

the shape of a life assurance effected as here for the special benefit of wife or children must be, as I hold, taken into consideration.

We have been referred to some American decisions. I have examined them, and find that the court refuses to consider an accession of fortune resulting from the death: *Althorf v. Wolfe*, 22 N. Y. 355. The question is not argued, and was decided at the trial. In *Harding v. Townsend*, 43 Verm. 536, the preceding case is referred to as the authority. *Lake Shore, &c., v. Miller*, 25 Mich. 274, was an action by the party injured.

Terry v. Jewett, 17 Hun 395. This case was in the Supreme Court, N. Y., in 1879. The father sued for the death of his daughter. He was entitled to her property. At the trial the judge was asked to tell the jury to take this fact into consideration. He refused.

In the Supreme Court the case was very fully argued on other points, and many cases cited, but none apparently on this point. The only notice taken of it was referring to counsel's request to the judge at the trial: "The request was but little less than asking the court to charge that the defendant, having benefited the plaintiff by killing his daughter and thus putting him in possession of her estate, is entitled to compensation for the service in the shape of a reduction of the damages given by the statute. The request was properly refused."

We may despair of being able to frame our judgment in a form so neat and epigrammatic, but I fear we cannot adopt its reasoning in the face of the view apparently taken by our own legal sages.

In *Sherlock v. Alling*, 44 Ind., at p. 199, the point is raised but not discussed at length. The Court refused to hold that insurance money should be deducted. The only case directly in point cited was *Althorf v. Wolfe*. The Court say: "That no case has been found recognising the doctrine claimed, and we are not willing to be the first to sanction it." This was in 1873.

They also say: "If the argument be sound it would apply to a case where the pecuniary benefit resulted by descent or devise."

This is hardly in accordance with the law in our *Pym Case*.

There is a reference to a case in the Supreme Court, *Railroad Company v. Barron*, 5 Wal. 90, but on examination I do not find this particular point discussed.

On the other branch of the case as to negligence, I do not see any reason to differ from the conclusion of the court below. As far as I can understand the voluminous report of the case the learned Chief Justice, although expressing his inclination to the opinion that the ringing and whistling clauses applied to the Great Western Company; yet he endeavoured to keep the questions apart so that there should be findings of the jury covering each aspect of the case so as to obviate the necessity of a new trial if any different view of the law should prevail. He puts the question to the jury as to the whistle and bell, subject to the objection. He says, p. 273, "I put that, of course, subject to the objection." It was also understood that the question as to "return fences" along highways was not to be left to the jury.

The following are the questions and answers:

The jury returned at 7.30, p. m., with the questions answered as follows:

1. Did the persons on the train omit to whistle or sound the bell, eighty rods east of the Metcalfe street crossing, and to keep the same sounded at short intervals, up to the time of the accident? A. Yes.
2. Was the deceased driving at the time immediately before, and up to the time of the accident, with proper care in approaching the Metcalfe street crossing? A. Yes.
3. Could the deceased, by the exercise of proper care on his part, have avoided the collision? A. No.
4. Did the company do what was reasonable and proper, considering the high rate of speed of this train, and the locality through which it was passing, and the probability of persons using those crossings, to warn or protect the public from danger or injury from the train? A. No.
5. If not, in what respect did they fail to take such reasonable and proper precaution? A. 1st. By not having flagmen at crossings. 2nd. By not ringing the bell continuously, or not whistling at short intervals.
6. What, in your opinion, was the cause causing the accident? A. 1st. On account of obstructions on the line. 2nd. Want of sufficient warning from the train. 3rd. The very high speed that the train was running.

7. Was there any car standing on the through siding track, at the time of the accident? A. No.

8. Was the train running through a thickly peopled portion of the town, between Fawcett's crossing and Metcalfe street? A. Yes.

9. Was the railway track, omitting the highways along the part in question, properly fenced? A. Yea.

10. What, if any, pecuniary loss has been sustained by the death of the husband and father? A. \$3,000, and the value of the horse and waggon, \$250.

The jury apportion the \$3,000 as follows :

Widow	\$2,362 00
Boy of nine, James	320 00
Girl of twelve, Maria	204 00
Boy of thirteen, John	114 00

Upon the above findings and verdict of the jury, judgment in the action was ordered to be entered for the plaintiff for the sum of \$3,250.

I think the questions have been kept fairly apart; and it cannot be inferred from the course taken at the trial that the verdict of the jury in any way turned upon the existence or non-existence of a statutable obligation to ring or whistle.

The jury found that they did not do either, and in a separate finding hold that the company did not use reasonable and proper precaution in running through Strathroy, and amongst other matters, that they did not give sufficient warning from the train.

Now, wholly irrespective of statute obligations, it was shewn in evidence on behalf of defendants that directions were always given to ring and whistle passing this station, and that this was always done. If this was the constant practice, I think the public have a reasonable right to complain if it were omitted, and the trains were, without other previous notice, to rush through the streets of a town at a high rate of speed. The omission to give a signal, always known to be customary, is, I think, a disregard of public safety in such a place, which would go far to support a charge of negligence.

Giving the defendants the benefit, for the purpose of this suit, of assuming that there is no statutory obligation on this

subject, I still think there was evidence of negligence sufficient to warrant a recovery.

The jury expressly negatived contributory negligence. We need hardly deal with the question of weight of evidence.

In a very recent case in the Lords, *Metropolitan Railway v. Wright*, 11 App. Cas. 152, decided last April, there are some very instructive remarks as to the duty of an Appellate Court as to weight of evidence.

The case of *Solomon v. Bitton*, 8 Q. B. D. 176, was discussed and qualified. It was held that the true question is, not whether reasonable men *ought* to have found such a verdict, but whether reasonable men *might* find it.

"If," says Lord Halsbury, "their finding is absolutely unreasonable, a court may consider that that shews that they have not really performed the judicial duty cast upon them, but the principle must be that the judgment upon the facts is to be the judgment of the jury and not of any other tribunal. If the word "might" was substituted for "ought to" in *Solomon v. Bitton*, I think the principle would be accurately stated."

Lord Herschell reviews the evidence and his words may be used by us in the case before us: "I am not prepared to say that a jury might not reasonably find that the accident was due to the negligence of the defendants' servants."

The motion by plaintiff to increase the verdict by the amount of this insurance must, I think, be dismissed.

And I also think that the defendant's motion against the verdict should be dismissed, and the appeal allowed so far as the decision directs the verdict to be increased.

It appears that the course adopted in moving to increase the verdict, was according to some understanding between the parties.

With my views of the law I need only say that I think the judgment erred in directing the named increase.

BURTON, J. A.—I am not disposed to differ from the rest of the court in thinking that there was evidence to support the findings of the jury on the question of negli-

gence, although if it had been a general verdict a new trial would probably have been necessary, but unless a different state of facts were established upon another trial the defendants might find themselves in a worse position than they occupy at present, as there was nothing in evidence to shew that they had any legislative authority to run their locomotive and cars over the line where the accident occurred. That, however, is a matter which may possibly be cleared up in the event of another trial.

The jury have assessed the amount of the loss sustained by the beneficiaries by the death of the deceased at \$5,750, and upon the question of the right of the company to set off, or deduct from that amount the proceeds of the policy of assurance which he had effected on his life, I am free to say I have been unable to come to any conclusion altogether satisfactory to my own mind.

I do not propose to go into any full discussion of the principles on which damages are to be assessed in such actions; we lately reviewed the cases in *Lett v. St. Lawrence*, 11 A. R. 1, and we are all familiar with the rule laid down in such cases, the difficulty is in the application.

The statute does not merely remove the operation of the maxim "*Actio personalis moritur cum personâ*," for the action is not one which the deceased could have brought if he had survived the accident, for that would have been for injuries he had sustained, and it is not given to the person representing in point of estate the deceased man, who would represent him as to all his own rights of action which could survive, but is given to a certain class of persons named in the statute and to no others. The circumstance that they sue in the name of the executor or administrator is a mere accident. The right to sue might have been given to the County Attorney or any other official as trustee for the class mentioned.

I do not therefore for a moment question that the only damages recoverable are such as the jury find are proportioned to the injury resulting from the death to the parties for whom and for whose benefit the action is

brought. But we must bear in mind that no action at all is maintainable unless the death was caused by wrongful act, neglect, or default of the defendants, such wrongful act, neglect, or default being such as would have entitled the deceased, if death had not ensued to maintain an action.

The question is, whether if a loss has been sustained by the beneficiaries by the death, that loss ceases to be a loss within the rule applicable to such cases by reason of the deceased having entered into a contract during his life, by virtue of which in consideration of payments extending, it may be over a quarter of a century, his nominees become entitled to the payment of a certain sum of money, those nominees being the parties who are claimants in the action?

It is possible that in accordance with the views entertained by some judges, such receipt if in excess of the loss may be a complete answer to the action, but if that view be correct it follows that the policy has been in fact effected for the benefit of the company to whose neglect the death is attributable, and that the family lose the twenty-five years' payments and interest which have been expended to procure that result.

There has been no express decision in England on the subject, but there are numerous dicta to support the view that in such a case no action is maintainable.

In America decisions are to be found the other way. I am free to admit that in some the distinction has not been borne in mind between actions by the party injured and actions of this kind based entirely upon the statute; but in others the distinction has not been overlooked, and judgments have been given adverse to the view that any such deduction should be made, the reasoning in which whether right or wrong commends itself strongly to one's common sense.

The text books, whilst laying down as settled law, that the insurance moneys must be deducted, all refer to *Hicks v. Newport*, to be found in a note to *Pym v. The Great*

Northern R. W. Co., in 4 B. & S. 403, so that we know the authority upon which the writers base their opinions.

Lord Chief Justice Campbell, in that case, is reported to have said in his charge to the jury after pointing out that they were not to look to the wants of the family, but to the loss they had sustained by the father's death, that they were first to consider what would be the sum if there were no insurance.

In that case there were two insurances, one against the very contingency which caused the death, and if that were paid and left the family in the same position as before his death, it is difficult to see how an action would be maintainable under the statute; as to this, there seems little reason to question the ruling, and it has been expressly affirmed in *Bradburn v. Great Western R. W. Co.*, in L. R. 10. Ex. 1.

Nor do I presume to question the ruling of his Lordship upon the other point, but his language does not, in my humble opinion, warrant the unqualified rule to be found in the text books.

This is his language as reported in reference to the life policies. "Then with regard to the policies upon his life, independently of accident, if you allow any deduction (and I think you will probably consider some deduction ought to be allowed) it will only be in respect, I should think, of the premiums that would be paid by the family, or which would have been paid by himself if the accident had not happened." The meaning of this as reported is not very intelligible, as the premiums would never have been payable by the family, as they would of course cease on his death, but if it was meant to convey to the jury that in estimating the amount of the pecuniary loss sustained by the family of the deceased, they were first to ascertain his gross income, then deduct from it all outgoings including the premium on his life policy, and after in that way ascertaining his *net* income compute the loss the family would sustain by reason of being deprived of that net income for the number of years that the deceased would probably

have earned it, taking into account the ordinary expectation of life, and his continued ability to earn the same income, and other such circumstances. If that be the meaning of the learned Chief Justice, I quite agree with it, and that that must have been his meaning is apparent from this fact that the policy in that case which was before the era of "Policies in favor of wives and children," would have been an asset of the estate which might have been totally exhausted in the payment of liabilities of the deceased. Under the circumstances, the direction to the jury that after ascertaining the amount that ought to be allowed for the pecuniary loss the family had sustained, they should deduct "any reasonable sum that you think should be deducted in respect of the life assurance," was not only too favorable for the company, but was wanting in that precision which one would have expected to find in a charge from a judge of Lord Campbell's eminence.

The loss having been estimated as directed, there was no evidence for the jury to allow a deduction unless it were shewn that the beneficiaries were to derive a benefit from the asset in question, which was applicable [in the first place to the payment of the debts of the deceased and then to the legatees in the case of a will or, in the absence of a will to the next of kin, which might include many others besides the beneficiaries for whose benefit the action was brought. I should think therefore the learned Chief Justice was quite correct in confining the inquiry to the amount of the premiums to be taken into consideration by the jury in the way I have indicated, and that the general direction to allow what they thought proper in respect of the life insurance without specific instructions, that so much only was to be allowed as was shewn by the evidence to have been received or set apart for the beneficiaries, can scarcely be regarded as a correct report of his Lordship's charge.

At most it amounts to this, that the learned Judge at nisi prius, whilst inclining against any deduction, thought it sufficiently open to doubt to warrant his telling the

jury that it might perhaps to some extent be taken into account : whilst Pollock, C. B., in the argument of *Pym v. The Great Northern R. W. Co.*, asks whether there is any case under the statute where, in estimating the damages, notice has been taken of life insurance left behind him by the deceased.

The statements in the text books, therefore, are not borne out by the authorities.

If a person deriving his income from landed estate dies and his children upon his death come into that income in an equal or larger proportion than before, they can maintain no action. Why ? Because they have by the death sustained no loss. If the deceased received an annuity which ceased at his death the beneficiaries named in the statute could, if they received a portion of it during his life, maintain an action. But if at his death it was divisible among them, and they received more upon that division than in his life time, they could maintain no action for the obvious reason that they had sustained no pecuniary loss. *Pym's Case* seems at first sight opposed to the view I am suggesting, but on looking at it again since the argument I am not clear that it is so.

The eldest son, whose position was improved by the death, could of course maintain no action ; but if in addition to the landed estate the father had been entitled to an annuity of £20,000, one-fifth of which the eldest son had received during his life time, is it clear that he would not have been entitled to maintain an action in respect of that loss ?

Here the moneys payable under the policy would have come to the beneficiaries at some time. What they lost was the proportion of the father's income they had been in the habit of receiving. They were deprived of that, and in respect of that loss they were entitled to maintain a suit. The jury assess these damages, as they were (in accordance with *Hicks v. Newport*,) properly directed to do, at \$5,750. From that ought the jury to have deducted the amount payable to the beneficiaries under a contract

which was payable at a specified time, that time being, as it happened, also the time of his death? That was a mere accident, depending on the form of the policy. It might have been an endowment policy, and have fallen due a few days before his death, when there could be no pretence for deducting it; can it make any difference that it became payable a few months or a few years subsequently?

These beneficiaries have, in the view of the jury, sustained a loss by the death of the deceased, amounting to \$5,750, unless the insurance money is deducted, and I have yet to be convinced that this sum secured to them by contract, and not resulting from or connected with the act causing the death, has to be taken into account in estimating the pecuniary loss. The payment has, it is true, been accelerated by his death; but it would have been payable to them at some time—it might be before or subsequent to his death.

thought at one time it might be necessary to send the case down to another jury to ascertain if anything should be deducted, but my doubts in that respect, were created by the remark of Lord Campbell, with which I have dealt. I think that the jury must have understood in this case from the charge that they were to arrive at the net income of the deceased by deducting the premiums and all other out goings; and that as the learned judge directed them to deduct the whole of the insurance moneys, which was accordingly done, the Queen's Bench Divisional Court were right in ordering the verdict to be increased in accordance with the leave reserved, and that no ground has been shewn for varying their decision.

The appeal, therefore should, in my judgment, be dismissed, with costs.

PATTERSON, J.A.—The plaintiff, suing as administratrix of her husband who was killed by a train of the defendants upon the Sarnia branch of the Great Western Railway, obtained a verdict for \$3,250, distributed amongst herself and three of her children. The jury would have assessed the

damages at \$2,500 more, were it not that the plaintiff and these three of her children became entitled to \$2,500 from a life policy which became payable by reason of the death of the deceased, and under the ruling of the learned Chief Justice at the trial, that amount was deducted.

The plaintiff moved in the Divisional Court to increase the verdict by adding the \$2,500, and her rule was made absolute, the Chief Justice dissenting.

The defendants also moved against the verdict for alleged misdirection on the subject of their duty in crossing the highway where the accident happened, and their rule was discharged.

They appeal against both decisions.

I am of opinion that the defendants' rule was properly discharged.

The finding that the bell was not rung or the whistle sounded, as required by the general Railway Acts of the Province of Canada and of the Dominion, cannot be said to be entirely against evidence, though the evidence for the opposite assertion was certainly so strong that a different finding would have seemed to us, who only read the evidence, more satisfactory; but no jury could be expected to find that sufficient precautions were taken against accidents from a train crossing an unprotected highway in a thickly peopled portion of a town at a speed of thirty-five miles an hour.

Most of the argument before us on this part of the case turned on the application or construction of statutory enactments.

It is not disputed that the Great Western Railway Company, on whose road the train in question was being run by the Grand Trunk Railway Company, was bound by section 144 of the Consol. Stat. of Can. ch. 66, which forbids the running of any railway engine at a greater speed than six miles per hour through any thickly peopled portion of any city, town or village, unless the track is properly fenced.

"Properly fenced" means, as to my mind seems very

plain, sufficiently fenced to keep cattle off the track and to intercept travellers along the highway. The argument that the section points only to such fencing as the statute expressly makes it the duty of the company to maintain entirely mistakes the object of the legislation. There is no general provision for fencing, either by gates or otherwise, across highways. Section 150, which has been referred to, deals with a different matter. It assumes that the highway is not to be interrupted by a fence, and provides against cattle which pass along the highway and cross the railway being allowed to stray along the railway, by requiring that, at the point of intersection of the railway with a road or a farm crossing, the crossing shall be sufficiently fenced on both sides of the points of intersection, so as to allow the safe passage of the trains.

Section 144 says nothing specially of highways. It is a general prohibition of greater speed than six miles an hour where, in a thickly peopled place, there is not an effective fence along the track. It does not forbid fencing the highway, and that may be effectively done by a gate that shall be closed when a fast train is coming, without creating a nuisance but on the contrary reducing the danger from the nuisance of the train.

What is forbidden is the excessive speed where there is no fence. The reason why there is no fence is immaterial. Whether it is because there is no express duty to fence cast on the company, or whether it is not permitted to fence the track across the highway, the fact that the track is unfenced remains, and therefore the speed must be kept within six miles an hour.

The defendants, however, have to maintain not only that they did all that the statute required in terms as to fencing, but that assuming them to have been under no statutory obligation, they nevertheless exercised reasonable care under the circumstances. On this point I do not attempt to add anything to the remarks of Chief Justice Wilson who has dealt with it fully and conclusively in his judgment.

I do not wish to be understood to hold that the general

clauses respecting ringing the bell and sounding the whistle do not govern the Great Western Railway Company in the working of their Sarnia branch, or even on the main line. My opinion is the other way.

Those general provisions originated with us in 1851 by the Railway Clauses Act, 14 and 15 Vict., ch. 51, in the first section of which it was enacted that "this Act shall apply to every railway which shall, by any Act which shall hereafter be passed, be authorized to be constructed, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save in so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act."

The London and Port Sarnia Railway Company was incorporated in 1853 by 16 Vict., ch. 101, and no reference was made in that Act to the Act of 1851, either by way of varying, excepting, or excluding its provisions or otherwise. Therefore, by the direct terms of the section I have just read, the Act of 1851 formed part of the charter of the railway. That result is not hindered by the express incorporation with the special Act of the provisions of the Great Western Railway Company's special acts, 4 Wm. IV. ch. 29, and its amending Acts, because that is contemplated and provided for by the first section of the Act of 1851.

It is true that the third section of the Act of 1851 goes on to declare that, for the purpose of making any incorporation of that Act with special Acts, it shall be sufficient to enact that the clauses of the Act with respect to the matter proposed to be incorporated, describing such matter as it is described in the Act, in the word or words at the head of and introductory to the enactment with respect to such matter, shall be incorporated with such Acts, and thereupon all the clauses and provisions of the Act with respect to the matter so incorporated shall, save in so far as they shall be expressly varied or excepted by such Acts, form

part thereof, and such Acts shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such Acts shall relate; but there is much force in Mr. Meredith's argument that the object or effect of the third section is not to qualify the plain force of the first, but is rather to authorize a short mode of reference to the subjects of the general Act, the effect of declaring that certain clauses, by the description under which they stand in the Act, shall be incorporated being, on the principle *expressio unius est exclusio alterius*, to except the others; and that when the special act is silent on the subject, the first section has the effect of carrying in all the clauses.

If the point were one requiring to be decided, there would, as it strikes me, be some difficulty in grappling with Mr. Meredith's objection.

But there is the Dominion Act 38 Vict. ch. 24, which I do not think was referred to on the argument.

The fourth section declared that section 20 of the Railway Act, 1868, as amended by section 5 of 34 Vict. ch. 43, should apply to every railway company theretofore incorporated, or which should thereafter be incorporated, and which was subject to the jurisdiction of the Parliament of Canada.

The Great Western Railway Company answered that description, and had done so for three years, since 35 Vict. ch. 5 (D.) if not for a longer period. Section 20 of the Act of 1868, headed "Working of the Railway," contained, in sub-section 10, the general rule respecting ringing the bell or sounding the whistle at level crossings.

The duty was thus cast upon the Great Western Railway Company in working any part of its system, and it must have remained when the accident in question happened, unless removed by the Consolidated Railway Act, 1879; but a curious oversight in the drafting or proof reading of the 100th section of that Act, may give room for ingenuity to raise some question or cavil on the subject, which makes it necessary to see what that section provides for.

It will be remembered that the Act of 38 Vict. ch. 24, declared section 20 of the Act of 1868, as amended, applicable to all these railways. The amendment was nothing more than the addition of a few words to the fourth sub-section of section 20. Sub-section 4 originally read thus: "4. The party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company." The amendment added the words: "From which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants."

The subsection, whether in its original form or as amended, is obviously without meaning except in connection with the preceding context. Yet in section 100 of the act of 1879, the act of 38 Vict. ch. 24 is recited as if subsection 4 alone, and not the whole of section 20, had been declared to apply to all railways.

That section 20 becomes section 25 in the consolidation of 1879, the subsections retaining their original numbers. When section 100 declares that certain provisions including "subsection 4 of section 25 of this Act," were declared by 38 Vict. ch. 24 (D) to apply to every, &c., and enacts that "they shall so apply accordingly," I take it that we must disregard the obvious mistake in the recital, and read the enactment as being that those provisions now included in the consolidated Act, which were by the Act of 38 Vict. declared to apply to every railway shall so apply. This we do on the principle laid down in section 102, which declares that the Act is not to be construed as a new law, but as a consolidation and continuance of the Acts which it repeals, subject to the amendments and new provisions thereby made and incorporated with them. Section 100 does not profess to amend the Act of 38 Vict., but to recite and adopt it; and the inadvertent character of the misrecital becomes very apparent when we see how meaningless it would make the enactment.

Thus the same duty to give the statutory signals seems to attach to the defendant company when running its

trains on the Great Western Company's roads as when on the Grand Trunk Railway proper.

Then as to the damages.

The subject must, of course, be approached with a distinct apprehension of the doctrine, now so well settled, that there is no question of solatium for injuries to the feelings or affections of the surviving relatives, or of punitive damages against the wrongdoer. It is compensation for such loss only as can be estimated on a pecuniary basis.

The widow has lost her husband and the children their father, but the only aspect in which, under the statute, we can regard their loss is expressed in the question : how much worse off are they in their material circumstances than they would have been if he had lived ?

Setting aside the life insurance of \$2,500, the jury estimated their aggregate loss at \$5,750.

The learned Chief Justice at the trial, held that from that amount the insurance money should be deducted because it came to them by reason of the death, and the verdict was entered for \$3,250. In the Divisional Court the deducted amount was restored, the learned Chief Justice, who dissented, holding that the whole policy money ought to be deducted ; but that, in any event, a deduction ought to have been made in respect of premiums which, on the estimated expectation of life at the age of deceased, would probably have been payable before his death in the ordinary course of nature.

I have come to the conclusion, though not without some fluctuation of opinion, that the judgment of the majority of the court ought not to be disturbed.

We have here the case of an ordinary all life policy effected by a man for the benefit of his family, the insurance money being payable to them at his death. There is always, in such cases, the contingency of forfeiture or of lapse by reason of non-payment of premiums ; but, if the policy is kept up and the family survive the insured, they receive the money, just as they did in this case. Their receipt of the money was accelerated by the unfortunate

accident, but it was not from the death that the right to the money arose. If the accident had not happened, the family would, according to the jury's estimate, have benefited by the life of the insured to the extent of \$5,750, and at the death, if no contingency had intervened, they would have received the whole insurance money. They do not gain that money by reason of the fatal accident, as they would the amount of an insurance against accidents only; they simply receive at an earlier date what they were ultimately to receive from whatever cause the death of the insured should happen.

On this view, which I understand to be the same presented in Lord Campbell's charge to the jury in *Hicks v. Newport, &c. R. W. Co.*, of which a note is given in 4 B. & S. at p. 403, it would be unfair to the plaintiff to deduct from the jury's assessment the whole amount of the insurance money.

The case of an estate or settlement coming to the widow or child by reason of the death of the husband or father is sometimes put as an illustration of gain by the death which may and ought to be put in the balance against whatever loss is suffered, and to this is compared the money accruing from a life policy.

General illustrations are apt to be misleading, and the analogy between money settled on wife or child and money bargained for with a life insurance company will, I imagine, be found either not to exist, or to tell against the argument.

It evidently fails when the settlement is made out of an estate the income of which, being received by the settlor during his life, is shared by his family, and when the damages are claimed in respect of the loss of that income. The possession of the corpus or capital, with the whole income it yields, is necessarily weighed against the loss of the share of the income previously enjoyed. If the scales balance evenly that item of damages is wiped out; but if the settlement scale goes down, and a fortiori, if there is nothing in the other scale by reason of the subject of the settlement yielding no benefit to the

claimants until the death of their relative, the question of deduction from damages claimed in respect of loss of earnings or income from other sources comes up, and something more of an analogy to insurance money is established.

To follow this out is merely to re-state the argument substituting estate or settlement money for insurance money.

If the right to the estate vests only by reason of the death, it is doubtless a gain from the death and should be set off against damages. It was such a position that I think Bramwell, B. had in his mind when, in *Bradburn v. Great Western Railway Co.*, L. R. 10 Ex. 1, in distinguishing the case before him from one under Lord Campbell's Act, he said, "If, therefore, the person claiming damages was put, by the death of his relative, into possession of a large estate, he was a gainer by the event."

But if by the settlement the estate was vested, the possession only being deferred till the death of the relative—which is the nearest analogy to the insurance—then the death merely accelerates the possession, and the deduction should be in respect of the acceleration only, and not of the value of the estate.

That is the case dealt with in *Pym v. Great Northern R. W. Co.*, 2 B. & S. 759. There £20,000 had been settled on eight children. The jury awarded £1,500 to each child for damages for the death of their father. The Court considered the assessment too large, and thought that £500 ought to be deducted from the amount awarded to each child; the deduction being influenced by the consideration, amongst others, that the enjoyment of the £20,000 had been accelerated, but no deduction being suggested, as I understand the case, by way of setting off any part of the capital. £1,000 had been allotted to the widow who had a jointure of £1,000 a year which she enjoyed after her husband's death, but no deduction was made from her allotment. Cockburn, C. J., is reported to have said: "Considering that, by the settlement, provision is already made on the father's death for the widow and children, that it is uncertain how far the deceased would have added to their

provision by saving from his income for their benefit, and that any such provision, whether under the settlement or otherwise, would not have come to them till the father's death, while on the contrary, both the money secured by the settlement, and the compensation awarded by the jury now become realised at once, we think the amount of the damages, so far as the children are concerned, too large."

But while I think the principle on which compensation is to be awarded under the Act would be violated by laying down as a rule that the whole amount of the insurance received by the family from a policy like that in question should be deducted from the jury's estimate of damages, it is, I think, equally clear that the facts connected with the insurance are proper for the consideration of the jury. The acceleration of the payment, though it cannot with certainty be affirmed to have put the parties in receipt of a larger sum than would ultimately have come to them, yet removed all contingencies out of the way. To what extent the present payment was, from this or any other reason, of more value than the expectation of the money whenever death should occur would, I apprehend, be a matter proper for consideration by the jury, and would be a benefit gained by the death, and a proper subject for deduction from the gross estimate of damages. Another such subject which is noticed in Lord Campbell's charge in the case cited, and also by the learned Chief Justice in his judgment in the court below, is the probable amount of premiums to be paid before the policy would, in the ordinary course of events, have fallen in.

It is obvious, however, that this involves the further question of the person by whom those premiums were to be paid. If the deceased in this case had kept up the policy, and, besides doing that, had been able to render those benefits to his family the loss of which the jury estimated at \$5,750, there would be no reason for taking those prospective premiums into account. They could only properly be deducted when the payment of them would reduce the money value of the policy to the family, as in one illustration put by Lord Campbell, if the family had to pay them.

No general rule for computing the proper deductions could be laid down, as each case must necessarily be decided with reference to its own circumstances.

In the present case we have nothing before us to warrant a deduction in respect of prospective premiums, nor have we any evidence on which we can say that either the jury or the court could found an estimate on which any deduction on account of the policy ought to have been made. Whether any evidence of the kind would have been given at the trial, if this particular phase of the subject had been brought into prominence, we cannot say. Possibly it might have been thought unlikely that a claim to any substantial deduction could be supported.

Under the circumstances, therefore, while I am satisfied that the receipt of the insurance money is a proper matter for the consideration of the court or jury in estimating the damages, and may afford grounds for making some deduction from a gross assessment, I do not think there is anything before us on which we can venture to say that the court was wrong in declining to make any deductions.

In my opinion, therefore, the appeal from both rules ought to be dismissed.

OSLER, J. A.—It is not in my opinion open to the plaintiff to argue on this appeal that the defendants did not prove at the trial any deed, or Act of amalgamation with the Great Western Railway Company, entitling them to run their trains over that part of the line of the latter where the accident occurred, and by which they could avail themselves of the franchises and powers contained in the Act or Acts of incorporation of that company.

No objection of that kind was raised at the trial, or on the argument in the court below, nor does it form one of the reasons against the appeal. The whole argument at the trial on this point proceeded upon the assumption that the defendants were duly united to, or amalgamated with the Great Western Company, and as to that division of their line were operating it under the statutes applicable to it.

The question was what these were, and what duties were imposed on the defendants thereby. I have heard it stated in actions against these defendants tried before myself that the union was effected by means of an agreement made under the authority of the Act of 16 Vict., ch. 39; sec. 7 of which declares that the rights and obligations of the company formed by the union shall, as regards fences, lands, roads, &c., be governed by the provisions regulating such matters in the Acts passed with reference to the railway to which such rights or obligations may relate. What however, the full scope of the Act is, and to what extent these railways were entitled to take advantage of and act upon its provisions, is not at present open for consideration.

Any objection intended to be taken to the regularity or legality of their proceedings should have been raised at the trial or on the pleadings. It would be most unjust to allow the plaintiff to spring it upon the defendants at this stage of the cause, and in effect to ask the Court to treat them as mere trespassers or wrongdoers in using the railway.

The statement of claim is in fact inconsistent with any such contention.

The questions raised by the appeal are the two usually debated in actions of this kind, namely, whether the defendants were shown to have been guilty of negligence, and if they were, whether the deceased was not also guilty of such contributory negligence as to deprive the plaintiff of recovery. A third question of a more important and interesting character is also raised as to the damages the defendants contending that the Court below have improperly increased the verdict of the jury by the amount of a policy of insurance on the life of the deceased when the jury, under the direction of the learned Chief Justice at the trial, had taken full consideration and allowed it in assessing the pecuniary loss sustained by the plaintiff and the other relatives for whom the death was a source of discomposure of the family.

As regards the appeal from the order discharging the defendants rule nisi, on which the first two questions arise, I do not think they can complain of misdirection on the part of the learned Chief Justice in telling the jury that there was any statutory duty cast upon them to ring the bell or sound the whistle on approaching a crossing. In substance, the case was put in the alternative: first, on the assumption that the 104th section of the Act applied to the defendants, and then upon the assumption that it did not. If it did, whether they had complied with its requirements. If it did not, whether under the circumstances, they had omitted, and if so, in what respect, to warn or protect the public from injury or danger from the passing train.

I think that Mr. Bethune, the learned and able counsel for the defendants at the trial, whose early death we all deplore, had no idea that the jury were confused or led into any misapprehension in their way of dealing with the questions by the manner in which the case was left to them. That appears by his merely objecting to the charge "formally, that the jury had been misdirected as to the duty of the defendants under sec. 104 of the Consol. Stat. Can.," and by the observation of the Chief Justice: "I put that of course subject to the objections so as to have the whole case found." There was no suggestion that the jury were likely to be misled into supposing that any absolute duty rested on the defendants in all circumstances to give certain prescribed warnings. The questions submitted to them, put the alternative cases clearly and precisely, and their answers shew that they intelligently understood them. Lastly, no objection for misdirection on this ground is taken, or to my mind intended to be taken, in the order nisi, which Mr. Bethune moved, and that alone is a sufficient reason for holding that it is closed to the defendants on the appeal.

Then upon the first question whether the defendants were guilty of negligence. If they can be shewn to have omitted any prescribed statutory warning, that would of

itself be evidence of negligence, but for the purposes of this case it may be conceded that under the Acts applicable to that part of their railway where the accident occurred they were not bound to give any *prescribed* warning of the approach of their train. I am disposed to agree with their contention on this point that sec. 104 of the C. S. C. ch. 66, does not apply to that part of their line and possibly sec. 25 of sub-sec. 10 of 42 Vict. ch. 9 (D.), the Consolidated Railway Act, 1879, does not apply to them either. It is unnecessary, however, to express a final opinion on this point, and it is much to be regretted that the course and practice of Dominion Railway Legislation has with regard to the Grand Trunk Railway, the Great Western Railway, the Northern Railway, and probably others constructed under the authority of Acts of the Parliament of old Canada been productive of considerable doubt and uncertainty as to which of the General Railway Acts and their amendments apply to them and to what extent.

But even if the statute has not prescribed any special warning the defendants are not thereby relieved from the duty of using reasonable care and caution to protect the public and avoid accidents at places where unless proper care is exercised accidents are likely to happen. Whether they have done so therefore under all the circumstances in any given case is, as it became here, a question for the jury.

The defendants, however, urge that negligence cannot be inferred against them from the high rate of speed at which they were running on the crossing where the deceased met with his death, because their track was properly fenced, and there was no restriction upon the speed of the train.

This makes it necessary to look at section 144 of the Consol. Stat. of Can., which does apply to this railway. The sections of that Act, excepted by the Great Western Railway Act, 35 Vict. ch. 65, sec. 5 (D.), are those between the 2nd and the 125th, both inclusive. Those from the 142nd to the 150th inclusive, and some others, are consolidated from 20 Vict. ch. 12 (C.), which undoubtedly

applied to all railways in this Province at the time of confederation.

The Great Western Railway Act, 4 Wm. IV., ch. 29, sec. 9, provided that the corporation "shall erect and maintain * * sufficient fences upon the line of the route of their single or double railroad or way."

The 144th section of the Consol. Stat. of Can. ch. 66, enacts that no locomotive or railway engine shall pass on or through any thickly settled portion of any city, town, or village, at a speed greater than six miles an hour *unless their track is properly fenced*.

Both parties invoke the latter section in support of their case, the plaintiff contending that the company were bound to fence across the highway by means of a movable bar or otherwise, as a condition of their right to pass thereon at a greater speed than six miles an hour, while the defendants insist that the Legislature never intended to authorise them to obstruct the highway, even temporarily, by means of a fence across it, and therefore section 144 can only mean that the track must be properly fenced through a city, &c., *except at the crossing*, and where that is done there is no limit to the rate of speed at which the latter may be passed.

I think, however, that the defendants are in this position. They must either fence the crossings as in *Renaud v. Great Western Railway Company*; 12 U. C. R. 408; *Parnell v. same*, 4 C. P. 517, and other cases, it was held that they were bound to do, or, if that is not the proper construction of the Act, they must take such precaution as circumstances demand to prevent accidents from occurring there.

By no possible construction that the section admits of are they absolved from this common law duty, even if the former is not imposed on them. If they are not required or permitted to fence the crossing, the Legislature has in effect said no more than this: "You may pass through a city or town at any rate of speed you please over your own track and on your own ground provided you have suffi-

ently fenced it. As to highway crossings it is unnecessary for us to say anything, the law says 'you must take care.' Their care, as the court observe in *Fero v. Buffalo, &c. R. W. Co.*, 22 N. Y. App. 209. must be proportioned to the danger of accidents, and where there is great danger there must be a corresponding degree of care. See also on the question of fencing a crossing: *Indianapolis R. W. Co. v. Parker*, 29 Ind. 471; *Lafayette R. W. Co. v. Shriver*, 6 Ind. 141; *Flint & Pere Marquette R. W. Co. v. Snell*, 28 Mich. 510.

It would be an extraordinary result if the public were to be protected against accidents likely to arise from a high rate of speed at places where they had no right to be, and yet not at those places, where having the lawful right to travel safely they would most need and expect protection. It does not appear to me that the supposed absence of an express authority to fence creates any difficulty in the construction of the sections referred to. There is no reason why the crossing should not be temporarily fenced by a movable or swing rail or bar. No greater obstruction need be caused thereby than is necessarily (and lawfully) caused by the mere approach and passage of the train.

The duty which rested on the defendants therefore, I assume to be at least that on which the fourth question submitted to the jury is based. "Did the company do what was reasonable and proper considering the high rate of speed of this train, and the probability of persons using these crossings to warn or protect the public from danger or injury by the train?"

I do not consider it necessary again to go through the evidence and number the witnesses who affirm, against those who deny a given proposition of fact. There was evidence both ways, the jury have weighed it, and for the reasons stated in the judgment of the court below, I am of opinion that the findings in answer to the above question, and the one following it, as to the particulars in which the defendants failed in their duty, ought not to be disturbed.

I concur also in the manner in which the finding on the question of contributory negligence was dealt with. It was very strongly pressed upon us that the evidence shewed that the deceased had actually attempted to drive across the track on which the train was proceeding after he had become aware of its approach. It must be remembered that the action from this time until that of the catastrophe passed in a few moments, and I cannot say that the jury were not warranted in holding that a person in the critical position of the deceased, partly, as the jury may have been satisfied, on one track, and partly in the space between it and the next one, his judgment paralysed by the tremendous prospect of the swiftly advancing train, and by the cry of one of the bystanders calling him to "hurry, hurry," was not guilty of contributory negligence because he did not on the instant determine that the train was on the track in front of him, and that safety depended on not complying with the call.

Then as to negligence in approaching the track. The jury have found that no warning was given, and if the company had been in the habit of giving one, the deceased not hearing it on this occasion, might either not have thought about the railway track at all, or might have supposed that he could safely drive over the crossing. But it is said that if he had looked he would have seen the train.

The jury had a view of the locus in quo, and were therefore in a better position than we are to judge of the value of the testimony as to the distance at which a train could be seen. They could tell whether the view was actually intercepted at any particular point, and also whether the view of a train advancing as this was, not at an angle to, but very nearly in the direct line of vision, was likely to be obscured or diverted by buildings or other objects standing at various distances on either side of it, so that the motion of the train might not readily arrest the eye even by a person expecting or deliberately looking for its approach.

The case seems on the whole as regards this branch of it,

to be one for the application of the rule affirmed in the recent case of *The Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 162—namely, that a new trial ought not to be granted unless the verdict was one which the jury viewing the whole of the evidence reasonably, could not properly find.

I desire to add that I do not think that any new rule has been laid down in that case on the subject of granting new trials in jury cases, and for the purpose of shewing that it is not a cast iron, hard and fast rule, applicable to all cases in all circumstances alike, I may quote the following passages from the judgment of Lord Blackburn in a House composed of Earl Selborne and Lords Blackburn, O'Hagan, and Watson in *Managers of Metropolitan District Asylum v. Hill*, (No. 1), 47 L. T. N. S. 29 :

"It is not easy, probably it is impossible, to lay down any precise rule as to when a new trial shall be granted or refused as against evidence, and I shall not attempt to do so. The power to do so is entrusted to the courts for the purpose of securing that as far as practically possible justice should be done. And the mode in which it is exercised, and the principle on which the courts act in doing so, seldom got into the reports whilst there was no appeal on such questions. The constitution of this country has entrusted the determination of facts to the jury, but even when the jury had acted properly on the materials before them, it may well be that without imputing blame to any one it may appear that the nature of the case was such that it was not sufficiently investigated * * and that a verdict founded on such imperfectly investigated materials is unsatisfactory. Even if that is made out it does not follow that there should be a new trial. The court has, in its judicial discretion, to weigh the delay, vexation, and expense of a new trial, all in fact which forms the foundation of the maxim '*Interest reipublicae ut sit finis litium*,' against the injustice which may be worked in the particular circumstances by treating a verdict so unsatisfactorily obtained as conclusive; and I think, though as I have already said, it would be difficult to find reported authorities for it, that the importance of the consequences of the verdict is always an important element in coming to a decision on such a question."

With this case may also be read with advantage Lord Mansfield's judgment on the same subject in *Bright v. Eynon*, 1 Burr. 391.

Then, with regard to the question of damages. In the prevailing opinions in the court below, the views of the English courts and text writers, are not noticed or distinguished. Those cases which are found in the American reports bearing on the question, are I think fairly open to the observation which was made upon them by Mr. Justice Burton in *Lett v. St. Lawrence and Ottawa R. W. Co.*, 11 A. R. p. 6, and owing to the different way in which the question has been regarded in the English and American courts, cannot safely be adopted or followed by us.

The difference in language of the statutes in force in some of the States, may account for the difference in the decisions, but it would seem that the limited nature of the action has, to a great extent, been lost sight of, and it has been treated very much as one in which damages might be assessed at large, as if in an action brought by the deceased for an injury not causing death.

It must be remembered that there is here no common law liability on the part of the tort-feasor.

"Lord Campbell's Act gave to a person who had no right before, a right of action as representative of other persons who also had no right before. The death of the man caused by the negligence of the defendants, is only part of the cause of action. There must be actual injury to the person on whose account the action is brought. The real cause of action is in fact pecuniary loss caused to the survivors." Per Brett. M. R., *The Vera Cruz*, (No. 2,) 9 P. D. 99.

And as Lord Blackburn tersely puts it in the same case, on appeal to the House of Lords, 10 App. Cas. 59, 70 :

"A totally new action is given against the person who would have been responsible to the deceased, if the deceased had lived; an action which is new in its species; new in its quality; new in its principle; in every way new, and which can only be brought if there is any person answering the description of the widow, parent or child, who, under the circumstances suffers pecuniary loss by the death."

If the nature of the action as thus described is borne in mind, and the rule, as developed in the English cases from *Blake v. The Midland R. W. Co.*, 18 Q. B. 93, downwards, applied, it appears to me, with great respect, the judgment in appeal proceeds upon a wrong principle in assuming that if the policy is taken into consideration the defendants are, as it were, being indemnified by, or obtaining the benefit of it. It is not a question of the company being indemnified for committing an actionable wrong, but of the plaintiff proving a cause of action by shewing that some pecuniary loss has been caused by the death to the individuals mentioned in the Act. In ascertaining that loss it is, I think, inevitable that the jury must take into consideration any policy of insurance, and the benefit derivable from it, just as in *Pym's Case*, the settlement upon the wife and children, which came into operation upon the death, was considered, and formed an element in estimating the damages. It is the death at the particular time which establishes the right and gives the benefit of the settlement in the one case, and of the insurance in the other, to the particular individuals to whom the death occasions a loss, and to the extent that the policy, or the settlement, diminishes the loss, to that extent they are not sufferers by the death.

On this branch of the case therefore, the appeal should be allowed. I should not be averse from granting the plaintiff a new trial if the other members of the court assent, but looking at the course taken at the trial, where the case appears to have been rested on this point on the right to add or deduct the whole amount of the policy \$2500, and at the fact that the plaintiffs did not ask the learned Chief Justice to submit the question at large to the jury as to what allowance should in their opinion be made in respect of it, and at the further fact that a new trial was not asked for, both parties apparently resting on the right to add or deduct the whole, I think the verdict ought not to have been disturbed, and that the appeal from the judgment on the plaintiff's rule should be allowed, and from that on the defendants' rule should be dismissed.

The court being equally divided the appeal was dismissed, with costs.

[This case has been carried to the Supreme Court.]

VICKERS EXPRESS COMPANY v. CANADIAN PACIFIC
RAILWAY COMPANY ET AL.

Railway company—Express company, facilities to—Preference of one express company over another—Consolidated Railway Act, 42 Vic. ch. 9 (D.)

Held, [affirming the judgment of the Court below] that in the absence of collusion the Court would not inquire into the reasonableness of the rates charged by a railway company to an express company.

Held, also, that the railway company having granted to one incorporated express company the privilege of employing their station agents to act as agents of that express company, such agents having, as employees of the railway company, the right to use the company's trucks and baggage house as places for storing goods; and refused the same privilege to another incorporated express company brought themselves within the provisions of sub-sec. 3 of sec. 60 of 42 Vict. ch. 9, (D.) which enacts that any railway company granting any facilities to any incorporated express company shall grant equal facilities on equal terms and conditions to any other incorporated express company demanding the same,

THIS was an appeal by the plaintiffs from the judgment of Boyd, C., reported 9 O. R. 251, where, and in the present judgments the facts giving rise to the action are fully and clearly stated.

The defendants the railway company also served notice by way of cross-appeal from so much of the said judgment as declared.

1. That the plaintiffs are entitled to the same facilities for carrying on express business on that part of the said Railway Company's line known as the Toronto, Grey, and Bruce Railway, as the defendants, the Dominion Express Company, are entitled to, upon the said portion of the Defendant Railway Company's line.

2. That the privilege of employing the station agents of the said Railway Company is an express facility within the meaning of the Consolidated Railway Act, 1879.

3. That the plaintiffs are entitled to such privilege together with the other advantages incidental thereto so long and to the same extent as the said agents are permitted to act as agents for the Dominion Express Company; and that so much of the said judgment is also erroneous as grants relief to the plaintiffs, based upon the above declarations, and that the said judgment ought to be varied accordingly upon the following grounds:

(a) The contract made between the said Railway Company and the Dominion Express Company was made before the plaintiffs were incorporated as a company and was reasonable in all its terms and conditions.

(b) The plaintiffs demand express facilities over less than two hundred miles of the Defendant Railway Company's line, whereas the agreement

between the said Railway Company and the Dominion Express Company extends over three thousand miles of railway.

(c) The "facilities" referred to in the 3rd sub-section of section 60 of the Consolidated Railway Act, 1879, are the same "facilities" as are referred to in sub-section 2 of the same section, and are merely "facilities for the receiving and forwarding and delivery of traffic."

(4) The privilege of employing the said station agents is an outside matter, and is not an express facility within the meaning of the Railway Act.

(5) The privilege of employing the said station agents in the manner described in the pleadings was granted to the Dominion Express Company for a valuable consideration, namely, the carriage and handling and safe delivery of all money packages forwarded along this line by the defendant Railway Company. Inasmuch as the plaintiffs only carry on express business on a short section of said line, it was and is impossible to make any such arrangement with the plaintiffs. If, therefore, the said judgment is in that respect sustained, the said railway company may have to pay a large sum for the carriage, handling and safe delivery of such money packages. The case is not one of "undue or unreasonable preference or advantage" within the meaning of the Railway Act.

(6) The said railway company having granted express facilities to the Dominion Express Company over its whole system, embracing over three thousand miles of railway, upon certain "terms and conditions," cannot be compelled to grant express facilities to the plaintiffs except upon the same "terms and conditions"; that is to say, the plaintiffs, in order to entitle themselves to "facilities" equal to those enjoyed by the Dominion Express Company, must agree to carry on business over the said railway company's entire system of railway and must agree to all the other "terms and conditions" contained in the agreement made with the Dominion Express Company.

* * * * *

(8) The Dominion Express Company and the Canadian Pacific Railway Company were equally interested in sustaining the agreement referred to in paragraph five of this notice, and, the direction that the latter should pay the costs of the former is erroneous.

The appeal and cross-appeal came on to be heard before this Court on the 4th and 5th of March, 1886.*

Robinson, Q. C., and McCarthy, Q. C., (Creelman with them), for the appellants.

The terms sought to be imposed upon the appellants by the respondents, the railway company, were not just or reasonable, and therefore so much of the judgment of the

* *Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

Court below, as denied to them the right to have express facilities at reasonable rates is erroneous and ought to be reversed, or varied, or modified.

The railway company, having undertaken to carry on express business, became as to such business common carriers, and were bound by law to transact that business at reasonable rates.

No doubt it may be reasonable for a railway company upon being requested to do express business, to require that the earnings should amount to a certain sum in order to induce them to embark therein ; but it is only in that sense, and for that object, that the imposition of the terms of the minimum guarantee could be allowed.

The plaintiffs contend that the stipulation insisted on by the railway company is unjust and unfair in this, that while the railway company afford no more room to both express companies than they had previously granted to one, and while they are in fact not carrying more express matter for both companies than formerly for one alone, they are paid by each company more than either company is actually earning according to the rate agreed upon in the contract under the stipulation of this minimum guarantee.

So far as the clause in the Railway Act has a bearing upon the question, the contention of the appellants is that it is not in substitution of the appellants' common law rights, but is a cumulative provision in addition thereto, not intended to deprive the public of what their rights were, but to impose a duty which perhaps was already sufficiently imposed upon railway companies so soon as they undertook to do express business without any legislation in that behalf.

W. Cassels, Q. C., and G. T. Blackstock, for the respondents, the Canadian Pacific Railway Company.

Before the plaintiffs were incorporated as a company these defendants had entered into a binding agreement with their co-defendants, the Dominion Express Company, for a term of years extending over the company's entire system of railway. The terms and conditions of such agreement

were fair and reasonable, and such as are contained in agreements between other railway companies and express companies; and these defendants had no power, without the consent of the Dominion Express Company, to cancel that agreement, and it would have been unfair if these defendants granted more favorable terms to any other express company, subsequently demanding express facilities; and the court, in the absence of fraud, had no jurisdiction to vacate or alter such agreement, or to require the parties thereto to enter into a new or different contract. The only jurisdiction which the court has in the premises is that conferred by sub-section 3 of section 60 of the Railway Act, which was to compel these defendants to grant facilities to any incorporated express company demanding the same "upon equal terms and conditions" to those previously granted to any other incorporated express company.

Under the provisions of the Railway Act, these defendants could only be compelled to carry freight in the ordinary way. Contracts with express companies are entirely matters of arrangement, and do not come within the provisions of the Railway Act relating to tolls and tariffs, and the court has no jurisdiction to interfere with such arrangements, or to prescribe the rates, terms and conditions of such contracts.

If the contention of the plaintiffs is correct, it would necessitate a new agreement and a new adjustment of rates and tolls, and a new settlement of "terms and conditions" whenever any other express company demanded express facilities; and again, whenever and as often as one out of two or more express companies with whom agreements had been so made ceased to carry on business.

Moss, Q. C., for the respondents, the Dominion Express Company.

The agreement between the Canadian Pacific Railway Company and these respondents was made on the 1st day of January, 1884; and, until their incorporation in the month of October, 1884, the appellants were not entitled

to require the Canadian Pacific Railway to carry for them, or grant them any express facilities, and it would be unfair and unjust to these respondents if the appellants were awarded lower or more favorable rates than those imposed upon these respondents, without relieving them from the terms of their agreement.

Besides the evidence shews that the appellants were willing to accept an agreement on the same terms as these respondents, and at the trial Mr. Vickers, their President, so stated, and they should be held bound thereby.

In addition to the cases cited in the court below : *London and North-Western R. W. Co. v. Evershed*, 3 Q.B.D. 134; 3 App. Cas. 1029; *South-Eastern R. W. Co. v. Railway Commissioners*, 6 Q. B. D. 586; *American Union Telegraph Co. v. Bell Telephone Co.*, 10 Cent. L. J. 437; *Dinsmore v. Louisville, N. A. & C. R. W. Co.* 3 Fed. Rep. 597; *Fargo v. Louisville, N. A. & C. R. W. Co.*, 6 Fed. Rep. 787; *Sanford v. Catawissa R. W. Co.*, 24 Penn. St. Rep. 378; *Southern Express Co. v. Louisville and N. R. W. Co.*, 4 Fed. Rep. 481; *Southern Express Co. v. St. Louis, I. M. & S. R. W. Co.*, 10 Fed. Rep. 210; *Baltimore and Ohio R. W. Co. v. Adams Express Co.*, 22 Fed. Rep. 404; *Nitshill Coal Co. v. Caledonia R. W. Co.*, 2 Nev. & Mac. 39; *Goddard v. London and South Western R. W. Co.*, 1 Nev. & Mac. 308; *Fishbourne v. Great Southern and Great Western R. W. Co.*, 2 Nev. & Mac. 224; *Marriott v. London and South Western R. W. Co.*, 1 Nev. & Mac. 47, were referred to.

April 20, 1886. HAGARTY, C. J. O.—The main questions discussed on this appeal and cross-appeal are stated by the learned Chancellor, as : 1st. As to the right of the Vickers Express Co. to complain of the exorbitance of their (the railway company's) charges. 2nd. As to whether or no under the arrangements by the Canadian Pacific Railway Company with the Vickers Express Company and the Dominion Express Company there has been on the part of the Canadian Pacific Railway any undue preference shewn to the latter as against the plaintiffs.

It is not necessary to re-state the facts which appear so fully in the judgment below.

On the first point the plaintiffs insist that the charges demanded from them are unreasonable and exorbitant. This claim opens an important question. Is there any jurisdiction in the courts to inquire into or interfere with any arrangement made between a railway company and an express company beyond or outside of the provision in the statute?

"Any railway company granting any facilities to any incorporated express company shall grant equal facilities on equal terms and conditions to any other incorporated express company demanding the same."

We are bound to see that this provision is fairly observed. It points wholly to the second branch of the case, and does not assist the discussion of the other. It is not suggested to us that there is any other statutable provisions bearing on the relations between express companies and railway companies. I am not able to satisfy myself of the soundness of the argument of plaintiffs' counsel as to the railway company being bound by law to do business with express companies as such. If they elect so to do they must give equal facilities to all. But are they bound to enter into such business at all? The learned counsel cited several American decisions in which it appears it was held that at common law the railway companies were bound to allow this express business on their roads. We were naturally somewhat surprised on the argument with the broadness of the views expressed as to the elastic properties of the common law. Since then we have been favoured by counsel with the recently pronounced judgment of the Supreme Court of the United States, in which these decisions have been reversed. (Judgment delivered 1st March, 1886.)

It is very clearly pointed out that all arrangements with express companies must necessarily be by special contract—that there is not "a syllable of evidence to shew a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for * * the

fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time."

The court points out that the cases do not present the question as between the general public complaining that the railroads will neither do express business themselves nor permit express companies to do it, but it is merely the case of the companies insisting that they "can now demand as a right what they have heretofore had only as by permission."

For myself I do not at present see why the railway company may not refuse to enter into any special arrangements in the first instance with express companies, or why, if they thought proper, they could not do the great bulk if not all of the express business themselves, so far as the receipt and delivery of goods and parcels, large or small, may be concerned. See judgment of Bramwell, B., in *Evershed v. London and North Western R. W. Co.*, in Court of Appeal, 3 Q. B. D., at p. 141, affirmed in H. L. 3 App. Cas. 1029; *Brice on Ultra Vires*. 2nd ed. 431 *et seq.*; *Parker v. Great Western R. W. Co.*, 7 M. & Gr. 253; *Baxendale v. Bristol and Exeter R. W. Co.*, 11 C. B. N. S. 787. This is merely my present view, not necessary for the decision of this case.

As to the argument on the reasonableness of the charges claimed against the plaintiff company.

I do not see how it is possible for us to apply any general rule which would assimilate the right of express companies as to the amount to be charged to them, and the alleged common law right of individuals as to the carriage of themselves or their goods on railways. An express company requires certain special accommodation for the carriage of its parcels on passenger or express trains, a person in charge, swift despatch and delivery at destination, and other facilities wholly different from the ordinary conveyance of passengers or merchandise. For all matters connected with the latter fixed tolls are provided. Section 7, sub-sec. 11 of the act (1879), allows the company to

transport persons and goods and to regulate the tolls and compensation to be paid therefor. See also sec. 17 to the like effect. Sub-section 6 directs that "the same tolls shall be payable at the same time and under the same circumstances upon all goods and upon all persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-laws relating to the tolls."

Sec. 25. Passengers and goods shall be taken, transported, and discharged * * on the due payment of the toll, freight, or fare legally authorized therefor.

Interpretation clause 5, sub-sec. 8, defines "toll" as including any rate or charge or other payment payable under this or the special Act for any passenger, animal, carriage, goods, merchandise, matters, or things conveyed on the railway.

They are to exhibit in their offices schedules of tolls, and sub-sec. 9 of sec. 17 requires their by-law establishing the tolls to be approved by the Governor in Council, to whom power is given to revise the rates, and powers are likewise given (sub-sec. 11) to Parliament to reduce the rates on certain conditions.

These clauses against the giving of undue advantage or privilege extend to the vast majority of all the company's transactions as to the carriage or transport of passengers and goods of all kinds. They would be held to apply, I think, to all persons alike, whether such persons were or were not engaged in the business of collecting and sending packages of goods not their own, and delivering the same at different points as directed.

This business is discussed in *Great Western R. W. Co. v. Sutton*, L. R. 3 H. L. Cas. 239. The plaintiff was what he calls "an intercepting carrier," competing with defendants in one of the most lucrative branches of their trade. He was in the habit of sending various parcels of goods in one package by rail for distribution by his agents at a named point; this was for his own profit. It was proved that mercantile houses were in the habit of sending packed parcels of different kinds of goods sent from and to different

persons. This was for the accommodation of their own customers and friends. This was a practice well known in the trade. The company made a lower charge for these than for parcels packed in the same manner by the plaintiff who was himself a carrier. This, it was held, they could not do.

Blackburn, J., says, giving[†] the opinion of himself, Keating, Pigot, and Lush, JJ., Willes, J., also agreed: "It would be of the very essence of the case to prove that the goods were 'of the like description and carried under the like circumstances.' But I think (he says) that this applies to the description of the goods and the circumstances of the carriage, and not to the trade of the consignor or consignee." He reviews the cases; especially *Parker v. Great Western R. W. Co.*, 7 M. & Gr. 253; *Edwards v. Great Western R. W. Co.*, 11 C. B. 588; *Crouch v. Great Northern R. W. Co.*, 9 Ex. 556, and others.

I do not find any substantial difference between the Imperial Acts and ours as to these preference clauses, and I think we must hold that the carrier stands in the same position as the rest of the public.

Lord Blackburn quotes the emphatic language of Tindal, C.J., in *Parker v. Great Western R. W. Co.*, that the Legislature had prescribed that "every member of the community should have an equal right to use it (i.e., the road) on the terms prescribed by the Act, and that the payment to be made for such user, whether under the denomination of rates or tolls or charges fixed by the company, should be reasonable and equal to all persons, without reference to the particular advantage to be derived by any individual or class of individuals for such use."

Lord Blackburn adopts the same view as to the classes of persons in the appeal of *London and North Western R. W. Co. v. Evershed*, 3 App. Cas. 1038.

As soon as we turn to cases like the present, where the nature of the business sought to be done on the railway requires special accommodation for goods not to be treated as ordinary freight, but to be forwarded on fast trains with car accommodation to a named extent, &c., we cannot apply the ordinary statutable provisions of equality. It is

absolutely necessary that a special bargain and contract has to be made, and, as already suggested, I can see no ground on which any particular bargains can be forced by law on a railway company. I think, in the absence of special legislation, it must be left to the company to decide whether they can provide any, and, if any, what accommodation for express business as distinct from the ordinary transmission of freight or passengers. The defendants have chosen to make a special contract with the defendant express company over their great line and its branches, the latter paying a large sum for the privilege and a minimum mileage rate. Having done this the Legislature fastens on them the liability to grant equal facilities on equal terms and conditions to any other express company requiring the same. They answer this by offering to place the plaintiffs' company under the same terms and mileage rates over the Toronto, Grey, and Bruce section as the Dominion Company pay for the same.

But for the "equal facilities" question to be discussed hereafter, the plaintiffs at first were willing to accept these terms. They now urge that the demands of the defendants are unreasonable and exorbitant; that especially if they have to pay the same minimum mileage rate it would be ruinous to them, as the volume of traffic would remain much the same, and they would in effect be paying for half the trade the \$6 per mile per month;—the same which the Dominion had to pay.

I do not see on what principle we can interfere with this. When it is proposed to a railway company to contract with an express company, it seems a fair matter for the former to require a guarantee that there shall be at least a named minimum profit on the business. The sum named here cannot be considered unreasonable, as it was not very much in excess of what had been paid by Mr. Vickers when doing this business previously in person.

It is urged by the plaintiffs that though this may be reasonable when only one express company is on the line, yet when another or two or three others claim the right to

use it also they should not be required to pay an equal sum.

When the railway company agree with the first comer they are not, as I conceive, bound to make their bargain in the anticipation that other companies will also apply. Mr. Robinson urged that they should provide for such a contingency in their bargain with the first comer. I am unable to accept that argument as sound.

It is well pointed out in Chief Justice Waite's judgment, already referred to, that as a rule only one express company has been admitted on a road at the same time. He says: "It by no means follows that because a railway company can serve one express company in one way, it can as well serve another company in the same way and still perform its other obligations to the public in a satisfactory manner. * * So long as the public are served to their reasonable satisfaction it is a matter of no importance who serves them."

If after an express company is working on the railway another company seeks the same privilege our Legislature seems to require that they must have it. The second company deems the volume of business to be sufficient to warrant their attempting to share it. They apply, and the railway company produce their contract with the first company and declare their readiness to deal with the new company on precisely the same terms as to remuneration. I cannot see how the latter can object or urge that the railway will thus be getting double mileage. The first company might, I suppose, complain with equal plausibility that as the new company had to pay the same mileage the rate charged on them should be reduced and that there should be a readjustment of charges if one of several express companies doing business on the road chose to retire from business. I do not see how this is a matter with which the law can interfere.

Even assuming our right to enter into the question of reasonable charges in such a case as this, I cannot see on the evidence before us that any case is made out.

I, therefore, agree with the view taken on this branch of

the case by the learned Chancellor, and refer to the reasons therefor in his judgment.

It remains to consider the company's appeal from the decision of the Chancellor as to the "equal facilities" clause. While Mr. Vickers had the sole express business on the road the company's officers and servants were allowed to act for him as agents in the management of the business, &c., he allowing them remuneration therefor. On the evidence it was very clearly shewn and admitted that this was a most valuable privilege to him. When his contract was ended and the present defendants assumed the road, they entered into the contract with the Dominion company. This contract is silent as to any service to be given by the railway servants. It is asserted, however, that there was a further agreement, by which in consideration of the Dominion company agreeing to carry all the railway company's money packages along the whole line free of charge, the railway company agree to permit its agents to act exclusively for the Dominion Express Company.

The Canadian Pacific Railway Company urge several objections to this claim. One is, that the plaintiff company only seeks to do express business over a section of their road, less than 200 miles, while the Dominion company's contract is over their whole line, over 3,000 miles, and that the plaintiff company cannot do for them the valuable service of the larger company, for which they agreed to give them this exclusive privilege of using their agents.

As to this objection, I do not see how we can limit the language of the statute. If we adopt the defendants' view we must hold that "equal facilities" are only intended by the Legislature to apply to express companies operating the whole length of the line from the Atlantic to the Pacific, and that each express company seeking facilities must have the same termini as the company already working on the road. It would apparently follow from this position that if the plaintiff company had an existing contract for

the portion of the line between Toronto and Owen Sound, the Dominion company claiming under the "equal facilities" clause could not legally require any special privileges which the Vickers company had acquired on that limited portion.

The Canadian Pacific Railroad has been allowed to obtain the possession and control of several previously independent railways connecting important towns throughout Canada. I cannot doubt but that the Legislature intended to apply the provision in question to companies seeking to do express business, as it had been previously done on these separate roads. I think this objection fails.

It is then urged that the railroad company has given this exclusive privilege to the Dominion Company for valuable consideration as to the free carriage of their money parcels over the whole line, a service which the plaintiff company cannot perform. I cannot consider this an answer to meet the statute. If effect be given to it the result would be to allow any arrangement of this character to defeat the plain words of the Act.

The most important objection is, that the privilege as to employing the railway agents is not a facility in contemplation of the statute, and that the "facilities" mentioned are merely facilities for the receiving, forwarding, and delivery of traffic, and that such employment is a purely personal and collateral matter.

The learned Chancellor has fully dealt with this objection "these agents (he says p. 270) have the right to use the company's trucks, vehicles, and the company's depots and baggage houses as the place for storing goods, they have also the right to use the iron safes which are there,

* * and the right to use all these passes with the employment of the agent when he is employed by any particular express company, so that you have this very property of the company, the carts, vehicles, and place for storing the goods which are admitted to be among the facilities for doing business for the company, you have all these embraced in this arrangement by which one express company can have this exclusive use to the detriment of a rival company."

I think the Chancellor has fairly construed section 60 and its four sub-sections, and that we may seek the true meaning of the word "facilities" by the language of the whole section and the manner in which the word is used in connection with traffic arrangements at the stations as between one railway and another, and the definition of the term "traffic."

The Legislature was providing for the convenience, protection, and management of the traffic at points of intersection or proximity, and shew what is meant by "facilities," and then comes the use of the same word in the same apparent connection as to express companies.

I think it may be gathered from the English authorities that if a company gave to any carrier or forwarder of goods privileges of the character described in the evidence before us, as to the use of their trucks, safes, baggage rooms, the paid assistance of their servants, &c., and refused all such "facilities" to other carriers or forwarders the courts would interfere.

I may refer to somewhat analogous cases, such as *Baxendale v. Bristol and Exeter R. W. Co.*, 11 C.B.N.S. 787. The head-note is:

"A railway company permitted a carrier (who acted also as superintendent of their goods traffic) to hold himself out as their agent for the receipt of goods to be carried on their line, and his office as the receiving office of the company, and goods were received by him at that place without requiring the senders to sign conditions, which the company required all other carriers who brought goods to their stations to sign. *Held*, an undue preference."

The peculiar facts of the case are instructive.

See also *Garten v. Bristol and Exeter R. W. Co.*, 11 C. B. N. S. 650, and cases there noticed: *Parker v. Great Western R. W. Co.*, L. R. 6 C. P. 554.

A large number of cases are collected in *Hodges on Railways*, 479 ed. 1876. The subject of "facilities" is treated of at p. 474.

On the whole I have come to the conclusion that the court below is right on this branch of the case. It is not

suggested that the time of the company's agents is so completely occupied by their ordinary duties as to prevent their acting for this express company, if willing so to do. It is suggested that the working on the line of a second express company may be productive of serious inconvenience, especially if the railway agents act for both. This cannot, I think, affect our decision on the "equal facilities" clause. It must rest with the Legislature to consider the alleged difficulties in the way of more than one express company acting on the same line, as pointed out in the late judgment of the Supreme Court of the United States.

I think both the appeal and the cross-appeal must be dismissed.

BURTON, PATTERSON, and OSLER, JJ.A., concurred.

Appeal and cross appeal dismissed, with costs.

BEEMER V. THE CORPORATION OF THE VILLAGE OF
GRIMSBY.

Road allowances—Roads opened on adjacent lands—Road allowance taken in lieu thereof—Compensation.

Where the owners of lands, adjoining original road allowances, laid out roads on their lands which were used as public roads for upwards of eighty years, the original road allowances being all that time in the occupation of the owners of the lands, and used and treated as their own property, and no evidence was adduced to raise a presumption that compensation had been paid to them for the roads so laid out.

Held, [affirming the judgment of OSLER, J.A.,] that the presumption was that the original road allowances had been taken and used in lieu of the roads laid out by the owners through their lands, and that a by-law to open up the original road allowance as of right, was invalid. *Burritt v. Marlborough*, 29 U. C. R. 119, approved; *Cameron v. Wait*, 3 A. R. 175, explained.

Appeal by the corporation of Grimsby from the judgment of Osler, J.A., reported 8 O. R. 98, where the facts are fully stated.

The appeal came on for hearing on the 11th of November, 1885.*

Osler, Q. C., and *Aylesworth*, for the appellants.

J. Maclellan, Q.C., and *Geo. Murray*, for the respondent.

February 10, 1886. PATTERSON, J. A.—The essential facts in this case are not seriously disputed.

The allowance for road between lots 10 and 11, in the 1st concession of the township of Grimsby, runs northerly towards the lake. The part of it now in question is in the incorporated village of Grimsby, and has never been opened as a travelled road, unless so far as action may have been taken under the by-law now attacked.

We have only to deal with that part of the road allowance which lies between the Queenston and Grimsby road and the railway. From the railway northward the line has been opened. When I speak of the allowance, there-

**Present*.—HAGARTY, C. J. O., BURTON and PATTERSON, JJ.A., and CAMERON, C. J.

fore, I shall be understood to refer only to the portion in question.

This allowance appears to have been used and occupied for some eighty years, or as long as the adjoining lot 10 has been occupied, along with that lot, but with the knowledge that it was an allowance laid out in the original survey. It is said that people were warned not to make graves in that part of it which was enclosed with the church-yard. But still the actual possession of it seems to have been just the same as if it had formed part of lot 10.

During all these eighty years the public had access to the lake over another road which gave the accommodation which the allowance had, in the original survey, been designed to afford. That road was used in lieu of the allowance. It ran, so far as we have to do with it at present, through lot 10, and was what is now called Patten street.

There is no direct evidence of the laying out of Patten street, but the necessary conclusion of fact from what we know is, that it was laid out by the owner of lot 10, who assumed the possession of the road allowance; or, if the connection between the laying out of the new road and the taking possession of the allowance were fairly open to dispute, Patton street, at all events, answered the alternative description of section 551 of the Municipal Act of 1883 as "a new or travelled public road laid out and opened in lieu of an original allowance for road."

There is no foundation whatever for inferring that compensation was made for the land dedicated as the new road; on the contrary, the fact of the occupation of the allowance by the owners of lot 10 is evidence that that was the compensation with which they were content.

The facts bring the case as distinctly within the terms of section 551 as one can well conceive a case to be brought without some formal record, or evidence from living memory, of the laying out of the one road and of the terms on which possession of the other was taken; and it is not to be denied that an important purpose and most useful

effect of legislation like that now to be construed, is the settling of questions which from the unavoidably informal character of the transactions of the early settlers, and the passing away of the whole generation, could not now be brought into litigation without risk of creating confusion and doing injustice. The law under section 551 is, that in either of the two cases described in it, "the owner, if his lands adjoin the original allowance shall be entitled thereto in lieu of the road so laid out." I shall presently notice the remainder of the section.

The two cases are, *First*: "In case any one in possession of a concession road or side line has laid out and opened a road or street in place thereof without receiving compensation therefor." *Secondly*: "In case a new or travelled public road has been laid out and opened in lieu of an original allowance for road, and for which no compensation has been paid to the owner of the land appropriated as a public road in place of such original allowance."

The facts before us seem to bring the case distinctly within the *first* class. That class is probably included in the second, in which the possession of the allowance is not made essential to the right to it; but the difference between the two classes as described may be usefully noticed as possibly bearing on the effect of the latter part of the section, which provides that the "council of the municipality, upon the report in writing of its surveyor, or of a deputy provincial land surveyor, that such new or travelled road is sufficient for the purpose of a public highway, may convey the said original allowance for road in fee simple to the person or persons upon whose land the new road runs."

The *second* case will evidently include, and seems so intended, roads laid out by the Quarter Sessions or the Municipal Council, though not confined to those roads, and the draftsman of it seems also to have had in his mind the substitution of a new road for an actually travelled allowance and not merely for allowances that were never opened for travel. Clearly, he intended to provide for cases where the allowance for which the new road was substituted was not in possession of the man whose land was "appropriated"

—which may mean either “dedicated” or “expropriated”—for the new road. In such a case the man who had no possession might require the conveyance which the Municipal Council is empowered to give.

It is to this case that, in my opinion, the latter part of the section is specially applicable. This part of the enactment first became law in 1857, by 20 Vict. ch. 69, sec. 5. That section embraced only what I have classed as the *second case* under the present section 551, and its provisions were similar to those of section 551 without the declaration, preliminary to that respecting the conveyance, that the owner should be *entitled to* the road allowance.

In 1858, by 22 Vict., ch. 99, sec. 318, the law was framed in the shape in which we have it at present; and in the Municipal Act of 1866 (29 & 30 Vict., ch. 51, sec. 334, (O.)) the same section was repeated, and the right of the person in possession of the allowance to retain it as against the Municipality was emphasised by sec. 338, excepting from the roads, &c., vested in the Municipality, “any concession or other road within the city, township, or town, or incorporated village, taken and held possession of by an individual in lieu of a street, road, or highway laid out by him without compensation.”

If, after this change in the law, a Municipal Council could convey in fee an allowance coming under the *first case* of section 551, it could be only as exercising a power, not by virtue of its ownership.

The declaration that the man in possession is entitled to the land, coupled with the extinguishment of the title of the municipality, is a statutory conveyance. This conclusion is not displaced by any inference to be drawn from the fact that power to convey is given to the municipality in terms wide enough to cover the case.

If the Legislature must be assumed to have intended the power to convey to extend to any allowance but those of the *second case*, or where the original road is vested in the municipality, that intention will be satisfied by providing by the conveyance a muniment of title capable of

registration and of being preserved as evidence, although unnecessary for the mere purpose of investing the fee.

The position would be like that remarked upon by Draper, C. J., in *Ryckman v. Van Voltenburg*, 6 C. P. 385, 387, in relation to the power given to a purchaser of lands at a tax sale under 6 Geo. IV. ch. 7, to claim a patent before the Heir and Devisee Commission, by 8 Vict. ch. 8, sec. 10.

"When it is remembered," he said, "that after the lapse of several years great difficulties might be met with in establishing, step by step, against an adverse claimant a title so derived, it will not be considered a useless enactment to enable such purchasers to obtain a grant from the Crown in their own names, thereby establishing their title and providing the easiest mode of its proof."

The power to convey is only exercisable after the surveyor shall have reported as the statute requires. This provision, while it adds strength to the view that the power only contemplates the *second case* and is not meant to touch the *first*, would of course have to be observed in every case where a conveyance was sought; and it has been argued that to dispense with the conveyance, and with it the supervision of the new road by the surveyor, would be to leave it open to the land-owner to seize the allowance for road without providing a sufficient road in its place.

I do not think any practical difficulty of this kind can have been contemplated by the Legislature, or is likely to be encountered in fact.

The bona fides of the substitution of the new road for the allowance would always be a question of fact, and the acceptance of the new road by user by the public would probably be a material consideration. But if further safeguards are required, the Legislature will doubtless see to it. In the present case the sufficiency of the substituted road for the purposes of a highway is beyond question.

The facts of this case very closely resemble those in *Burritt v. The Township of Marlborough*, 29 U. C. R. 119, and the construction of the statute adopted in that case and supported by the vigorous reasoning of Sir W. B.

Richards is that which must govern the present case. The decision was in 1868, and was therefore under the Municipal Act of 1866, in which the law was in the precise form retained in the Act of 1883.

It had been re enacted in the same terms in 1873 by 36 Vict. ch. 48, the sections 426 and 407 of which corresponded with sections 334 and 338 respectively of the Act of 1866, and with sections 551 and 527 of the Act of 1883.

It is said that the case of *Cameron v. Wait*, 27 C. P. 475, 3 A. R. 175, is in conflict with *Burritt v. Marlborough*.

If this were so we should probably consider ourselves bound to follow it as a decision of this Court; but there is not any real conflict between the two cases.

It is true that the reasoning of several of the learned Judges who took part in *Cameron v. Wait* may seem at first sight to indicate views of the statute not quite in harmony with those expressed in the earlier case; but, if understood with reference to the facts before the Court, it may be that there is no substantial difference of opinion. In *Cameron v. Wait* the new road had been laid out by the Quarter Sessions after formal proceedings, and in the face of formal opposition. The opinion of both Courts, the Common Pleas and this Court, was, that the road was not laid out in lieu of the original allowance; and further, that it could not be held on the evidence that the land for it had been appropriated without compensation to the owner. The decision went upon those grounds. If the case came within the statute at all it was clearly within the second class of cases, and was not a case in which the owner of land had laid out the new road and taken possession of the allowance in lieu thereof. It was in view of those facts that the necessity for a conveyance was discussed, and any opinions expressed must be understood with reference to the second class of cases under the statute. Even if any of the learned Judges had been inclined to differ from the views on which *Burritt v. Marlborough* was decided, they would doubtless have considered the re-enactment of the law in 1873 as a legislative adoption of them.

But if in *Cameron v. Wait*, which was decided in 1877 and 1878, the language of the statute had received a different construction from that given to it in 1869 in *Burritt v. Marlborough*, and assumed to have been adopted by the Legislature in 1873, a curious question might arise on the effect of the re-enactment of the identical sections in 1883.

Some other facts, brought out in the affidavits as the strong points against this application, are not material. They are rather reasons, if well founded, for opening the road along the allowance, or a new road somewhere else, under the powers in respect of opening new roads. I refer to such facts as Dr. Alexander's want of access to a part of lot 11, which it is said he owns, but when, why, or from whom he acquired it we are not told. He could certainly gain no right by buying it which his vendor did not possess when he sold it. Others say they have village lots coming to the allowance for road, that would be worth more if they had a street there, which is not improbable but is beside the question.

Nothing turns on a question which I think was raised in this case as to the right of vendees of portions of the lot to insist on possession of the allowance.

There was some discussion in *Cameron v. Wait* concerning the right of such a vendee, when neither he nor his vendor had taken possession in lieu of a road laid out by the vendor; but the question cannot properly arise when the fact of possession exists under circumstances like those now under consideration, throwing upon the Municipality the onus of establishing a right to disturb that possession.

The church trustees are shewn to have gone into possession of the road allowance in 1833, when they got a deed of the land adjoining it from a Mr. Griffin, whose title is not explained, and in 1872 they got a conveyance of a portion of the road allowance from the devisee of Col. Nelles, the owner from 1803, of lot 10.

I see no reason why, in view of the other circumstances of this case, the fact of their possession, or rather the fact

of the possession of the allowance in connection with lot 10, should not be held to be sufficient to enable those in possession to attack the by-law which assumes to treat the allowance as still within the jurisdiction of the Municipality.

I do not discuss the by-law of the township council of Grimsby, passed in 1875, for opening this road allowance. The argument upon it is, that because under it the road might be opened, therefore the by-law now in question ought not to be quashed.

What use might be made of that other by-law in case an action of trespass were brought for entering on the allowance, and a justification was attempted under the by-law, we have not to consider. We have simply to deal with the one before us. I see no reason to doubt the propriety of the order to quash it, and I therefore think we should dismiss this appeal, with costs.

CAMERON, C. J.—I concur in the opinion that this appeal should be dismissed for the reasons given in the judgment of my learned brother Patterson which I have had the opportunity of reading and considering. Under the circumstances of the present case, I think the possession of those who have held the road allowance when it is sought by the by-law in question to open it must be regarded after the lapse of more than half a century, in fact nearly a century, as equivalent to a formal conveyance thereof, the public having during the whole of that time had the use of another road which was opened in lieu of the original allowance that is to serve the purpose and accommodate the traffic of the public that the original allowance was intended to do, and for such other road there is no proof or no probability whatever that any compensation was made. I do not intend to intimate, and must be understood as not intimating that any length of possession will per se give the right to prevent the opening by municipal authority of an original road allowance unless there has been a road appropriated by the owner

of the land adjoining such road through his own land to, and used by the public in place of, the original road under such circumstances as to indicate the abandonment by the public of the original allowance. These circumstances exist in the present case.

HAGARTY, C.J.O., and BURTON, J.A., concurred.

Appeal dismissed, with costs.

SCOTT V. CORPORATION OF TILSONBURG.

Municipal Council—Exemption from taxation—Invalid by-law.

A by-law valid on its face was passed by a municipal corporation with the prescribed formalities under 47 Vict. c. 32, s. 8 (O.), for exempting the manufacturing establishments of one T. for the period of ten years.

At the time of its passing some negotiations had taken place between the Canada Southern Railway and the authorities of the corporation for the construction of a spur or switch from their railway into the town.

It was proposed on the part of the railway that the town should furnish the right of way and contribute \$1,800 towards the construction, involving, as it was stated, an expenditure of over \$6,000.

The council being unwilling to submit a by-law to the people, T., the largest ratepayer in the town, suggested that if his manufacturing establishments were exempted from taxation for ten years, the taxes thereon amounting to about \$280 a year, he would himself, furnish the right of way, and construct the switch.

The by-law was accordingly passed upon this understanding, and T. proceeded with and completed the work.

Held, (affirming the judgment of the Court below) BURTON, J.A., dissenting:—That the by-law was an evasion of the statute, and therefore illegal and void.

Per BURTON, J.A., That the building of the switch in question was an extension or improvement of the manufacturing establishments of T., not dissimilar in principle from that which is usually looked for (where exemptions of this kind are granted) viz., the expenditure of the taxes in the increase of the manufactory, differing only in this that the benefit was not confined to his own establishments:

That as the exemption might have been granted *mero motu* of the council, the mere circumstance that the manufacturer agreed to make an improvement, which was a public, as well as an individual benefit to himself and his own manufactories, could not invalidate it:

That the case was not brought within the sections giving power to the Courts summarily to quash; and that even if the courts had power to deal with the question summarily it was a case in which in the exercise of discretion it should not be exercised after the work had been completed, and

Quære, whether the proper course would not have been to apply for an injunction.

THIS was an appeal by the corporation of Tilsonburg from the judgment of Wilson, C. J., quashing a by-law (No. 163) of that town, reported 10 O. R. 119, where and in the present judgments the facts are fully stated, and came on to be heard before this Court on the 25th of May, 1886.*

Osler, Q. C., for the appellants. The by-law here in question was regularly passed by the council of the corporation, and on its face is perfectly legal and binding.

The judgment quashing it does not appear to have proceeded on the ground of there being any illegality in the form of the by-law ; or on any irregularity in the proceedings connected with its passage through the council : besides if the by-law is bad for any reason not appearing on the face of it, or for some irregularity or illegality in the proceedings leading to its passage, it is submitted that the Courts have not jurisdiction to quash it on summary application. In such a state of facts the proper proceeding for the party complaining to adopt is, to bring an action.

Here the Court has assumed an absolute veto power over municipal legislation, and has set aside this by-law on affidavit evidence, which attributes motives leading to its being passed ; although 47 Vict. ch. 32, sec. 8, (O.) amends 46 Vict. ch. 18, sec. 368, (O.) in such a manner as to empower every municipal council * * by a two-thirds vote of the members thereof to exempt any manufacturing establishment, &c., "in whole or in part from taxation for any period not longer than ten years." Here we find no limit or restriction whatever placed upon the discretion of the council ; and there is not any other clause restrictive of such discretion. This by-law which was passed in pursuance of the power given to municipal councils under the above enactment, legal in every respect on its face, is not subject to any veto power.

The complainant here seems to desire to constitute the Courts of the country a sort of second chamber to the municipal councils.

* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

W. A. Foster, Q. C., and W. Norris, for the respondent, contended that the transaction really was, that under color of exempting certain property of Mr. Tilson from taxation, to enable the railway company to construct a branch railway or switch by contributing \$1,800, and procuring the right of way without submitting the by-law to the vote of the ratepayers of the town; and that the exemption of Mr. Tilson's mills from taxation tended to create a monopoly in the milling business of the town.

Where such a by-law is objected to on the ground of illegality or improper conduct, in the passing of the by-law not appearing on its face, the inquiry into the facts tending to prove the illegal or improper conduct may be made on affidavits or orally; besides no reason is stated in the by-law for the exemption being made and taxing all others carrying on the milling business, which is evidently unjust, and tends to increase unnecessarily the taxation of all the other ratepayers in the town.

The authorities cited appear in the judgment.

June 30, 1886. *HAGARTY, C. J. O.*—There is no dispute about the facts; at all events they are not seriously in controversy. The corporation wished to have a switch, or short branch from the main line of the railway into their town. The railway company offered to make it on the terms of the town paying \$1,800 and finding the right of way. The corporation did not wish to submit a by-law to the ratepayers to raise the money:—doubtful, apparently, of obtaining their assent. Mr. Tilson, a large property owner, offers to stand in the place of the town to find the money and the right of way, and in return the corporation is to exempt his flour mills from taxation for ten years.

On this the by-law was passed July 27, A.D. 1885, as follows:

By-LAW No. 163, of the Town of Tilsonburg.

1. Whereas it is necessary and expedient to exempt from taxation for a period of years some of the manufacturing establishments of E. D. Tilson.

2. Therefore the Municipal Corporation of the Town of Tilsonburg enacts as follows: That for a period of ten years from the date hereof, the mill known as Tilson's Roller Process Flouring and Gristing Mill, and the mill known as Tilson's Split Pea Mill, both lying and situated upon block number fifty-seven, south side of Bloomer Street, Tilsonburg, be and are hereby exempted from all municipal and school taxation, according to the statute in such cases made and provided.

Read a third time and passed the twenty-seventh day of July, 1885.

(Signed,) WM. S. LANE,

(Signed,) L. C. SINCLAIR,

Town Clerk.

Mayor.



Dated at Tilsonburg, July 27th, 1885.

It is argued for the corporation that, in passing this by-law, they acted strictly within their statutable right.

The words of this Act are (47 Vict. ch. 32, sec. 8, (O.,) (1884):

"Every municipal council shall, by a two-thirds vote of the members thereof, have the power of exempting any manufacturing establishment, or any water works or water company, in whole or in part, from taxation for any period not longer than ten years, and to renew this exemption for a further period not exceeding ten years."

This clause is an amendment of ch. 18, sec. 368, of the general Act of 1883, by adding the words as to a two-thirds vote.

The general Act, in section 482, sub-sec. 10, enacts, under the heading of "aiding manufacturing establishments:—"

"That a by-law may be passed for granting aid by way of bonus for the promotion of manufactures, by granting money to such persons or body corporate, and in respect of such branch of industry as the municipality may determine;" but it must be subject to the assent of the ratepayers, and no property owner, or lessee, interested in, or holding shares or stock in any company shall be qualified to vote for the bonus.

These clauses in the general Act are respectively referred each to the other in the Act.

In 1868, 31 Vict. ch. 30, sec. 44, (O.,) confined the power to manufacturers of woollens, cottons, glass, paper, and other commodities of the like nature.

In 1869, by 33 Vict. ch. 26, sec. 15, (O.) it was amended by omitting these words and leaving it, "any manufacturing establishment."

The defendants urge that their authority to exempt a manufacturing establishment from taxation is absolute, and that they are the sole judges of the propriety of such a step. This proposition, for the purposes of this suit may be conceded in the sense that it is not a matter for judicial review whether they wisely or unwisely exercise the power, provided such exercise be directly resorted to for the simple statutory purpose of exempting a manufactory from assessment: but I am wholly unable to read the statute as authorizing the exemption for the express purpose of an evasion of another statutable authority, viz., the applying of municipal funds for a purpose to which they are forbidden to apply them without the direct sanction of the ratepayers.

The fair way to view this argument of defendants is to read the by-law with a preamble setting out the actual facts—the desire to procure the branch line; their willingness, for such purpose, to pay a named sum therefor; their unwillingness to submit a by-law therefor to the ratepayers, and Mr. Tilson's agreement "to stand in the place of the town," and pay the required amount, the town, on its part, agreeing to exempt certain property of his from taxation for ten years.

If such a by-law could stand, I am free to admit that I have hopelessly misunderstood the whole scope and bearing of our municipal system, and the extent of the revising power of the Superior Courts created by the Legislature.

I think we must always, in examining a by-law, see that it is passed for the purpose allowed by the statute, and that such purpose is not resorted to as a pretext to cover an evasion of a clear statutable duty—that it is, in short, a by-law for exemption, and not a mere pretext to cover the wrong committed by the council in applying the assets or monies of the corporation in a manner forbidden without the consent of the ratepayers.

I think the judgment of Sir J. B. Robinson, in *Re Barclay and Darlington*, 12 U. C. R. 86, 92, fairly illustrates the manner in which the jurisdiction of the Courts should be exercised.

The municipality there had the power to limit the number of licenses. They passed a by-law that only one should be granted. The Court considered that although it was not prohibitive in form it practically amounted to it, and was therefore an evasion of the law requiring the question of absolute prohibition to be submitted to the vote of the ratepayers.

The learned Chief Justice says: "We cannot look upon this as anything else than a contrivance by the Municipal Council to do that indirectly which they found they could not accomplish directly in the manner required by the Legislature. It was not a *bonâ fide* exercise of the discretion of limiting the number of licensed taverns, &c., * * it was intended to give the go-by to a legislative enactment which gave to the inhabitants a direct voice upon the question" * *

On the general jurisdiction he remarks:

"It is quite plain that a superintending power of a judicial character is necessary to be exercised in order to keep municipal bodies of this description, as well as corporate bodies of all other kinds, within legal and reasonable limits in the exercise of their powers. There has always been such a power where English law has prevailed—without it great oppression might be exercised, and great confusion created. It is a description of control which any Court to which it is committed, would rather be relieved from. In the nature of things the supreme Legislature could not exercise such a control so as to meet the exigency of each case—it is in their power, however, to vest the authority where, they think best, and, as the law stands, it is no where but in the supreme Law Courts, and these, while they retain it, must exercise it in each case under the same sense of responsibility as they discharge their other duties."

I refer to *Re Fenton v. The County of Simcoe*, 10 O. R. 27, where Wilson, C. J., enters into a very full examination of the cases in which the Courts have discussed

illegalities on the face of a by-law and illegalities in extraneous matters connected therewith.

In *Re McLean and Cornwall*, 31 U.C.R. 314, the Court of Queen's Bench quashed a by-law on several grounds, the first being "on the ground of the appropriation, (a grant of money to the mayor) being a most extravagant and unreasonable one, and out of all proportion to the revenues of the town."

In *Re Peck and Galt*, 46 U.C.R. 211, a by-law for closing up part of a square was held bad on its face, as it contained a provision that certain parties in whose favor it was passed, should pay all expenses and indemnify the municipality against proceedings to quash, &c., thus shewing it was plainly not passed in the public interest, but to benefit a particular class.

In *Re Morton and St. Thomas*, 6 A. R. 323, my brother Osler quashed a by-law for opening a lane: it was shewn that M. was the only person interested in having it opened, and it was quashed on the ground that it had not been passed in the public interest but simply to subserve the interests of an individual.

On appeal his decision was affirmed on this and other grounds.

See also *Pells v. Boswell*, 8 O. R. 689; *Re Baird and Almonte*, 41 U. C. R. 415.

I do not feel it necessary to discuss the particular merits of this proceeding or its bearing on the general interests of the town of Tilsonburg. This is, beyond my right. The principle here involved is of the utmost importance and our decision may establish a very extensive precedent.

The learned Chief Justice Wilson has pointed out some curious results of the sanctioning of this mode of proceeding. I may suggest another. A council is asked to grant a bonus of say \$100,000 to a company starting a new manufacture. The councillors are willing to do so, but fear to submit the proposition to the ratepayers. Ten individuals come forward and agree to find the money, if the council will exempt their manufacturing properties

from taxation. This is agreed to, and a by-law like that before us is passed.

It is difficult to conceive a more complete evasion of the law requiring the assent of the ratepayers to the proposed bonus or aid.

The taxes receivable by the municipality form its principal assets. I hold that any application of these assets for such a purpose as bringing a line of railway into the town is illegal without such assent.

Releasing an individual from payment of his taxes on condition of his paying the required amount for the desired object, appears to me a clear violation of duty.

I find it impossible, with the views I have always entertained on our municipal law, to hold that the decision of the Court below is not correct.

BURTON, J. A.—This is an appeal from an order of Chief Justice Wilson quashing a by-law valid on its face, and which was passed by the council with the requisite preliminaries and formalities.

The by-law was to exempt the two mills belonging to Mr. Tilson from taxation for ten years.

The Legislature has thought fit, it is not for us to say whether wisely or unwisely, to place it in the power of municipal councils by a two-thirds vote to exempt any manufacturing establishment in whole or in part from taxation for any period not longer than ten years, and to renew the exemption for any period not exceeding ten years.

If I were in a position to express my individual opinion I should denounce such legislation as unjust and tyrannical in the extreme, placing it in the power of parties interested in corner lots, or whose particular property may be benefited by the proposed exemption to enhance the value of their property at the expense of the rest of the community. To my mind it is class legislation of the most pernicious kind, and is, I have no doubt, open to very great abuse. But it is the law, and however objectionable it may

be in our opinion, we have no right to interfere upon a summary application of this description, unless the matter falls within the class of cases in which the Courts of common law would formerly have quashed upon motion.

I do not understand the jurisdiction of the Court of Chancery to have been so restricted as some of the Judges of this Court seem to have assumed in one case, *Vandecar v. Oxford*, 3 A. R. 181, referring to the cases of *Carroll v. Perth*, 12 Gr. 64, and *Grier v. St. Vincent*, 12 Gr. 330; 13 Gr. 512. I understand the decisions in Chancery as establishing that they would never interfere in cases where the common law Courts could grant relief in this summary way when the time had passed for moving at common law, but I do not understand that they confined themselves to restraining the enforcement of the by-law until the applicant had an opportunity to move at common law to quash; in fact, my experience in such cases was the other way, the Court of Chancery, as a usual thing, would not interfere in cases where the party could gain the necessary relief on an ordinary common law motion to quash, but where for any reason, as for instance, the common law Court not being in session, or it being doubtful whether the case came within the section of the Municipal Act allowing a summary application, the Chancery Court assumed jurisdiction, it proceeded in either case to deal with the whole matter and dispose of it finally.

Many of the grounds on which the rule was moved for in this case entirely failed; as for instance, that it was not passed by a two-thirds vote, or without notice, or the existence of corruption either on the part of the applicant or the members of the council.

That it tended to create a monopoly can be no possible objection, even if true, under an Act which by a system of bonuses and exemptions must necessarily have that tendency, but it is shewn to be untrue in fact, as the only other mill in the municipality is also exempt—the exemption in that case having been granted to enable the owner

of the mill to rebuild his dam which had been swept away by a freshet.

As I understand the law then, the council can, in the exercise of its discretion, exempt any manufactory, and there is no power vested any where to review that discretion. It may be assumed that a council acting *bonâ fide* in the interest of its constituents will not grant such exemption unless under that the conviction the grant will be in the interest of the public generally, therefore, whether so expressed in the by-law, or not, it is granted either on the understanding that the recipient will put up a manufactory, or enlarge an existing one, the motive being that by an increase in the number of ratepayers who will obtain employment at the manufactory, the municipality itself will benefit.

If that is made a matter of express bargain between the council and the applicant, it is no objection to the by-law. How does this differ in principle? I confess I find it very difficult to distinguish such a case from this. Mr. Tilson finds that he in common with the other business men in the town are suffering, and unable to carry on their business advantageously for want of competition, which can only be obtained by bringing another railway into the town. The municipality does not feel in a position at that moment, though anxious to secure the advantage, to incur the expense. All agree that it will have a tendency to reduce the rates of freight and thereby enable Mr. Tilson to enlarge his operations; but the benefit is not confined to him or to the probable increase in the number of his workmen, but the evidence shews that all interests are likely to share in the benefits.

The distinction, such as there is, appears to me to be entirely in favor of upholding this by-law. The learned Chief Justice quotes the words of the Act of 1883 for granting bonuses "as indicating that they are for the promotion of manufactures within its limits by granting money to persons in respect of such branch of industry."

Surely if the granting of a bonus to one individual in

respect to his particular business, and for the promotion of that manufacture, is legitimate, how much more so must an exemption of this kind be where the recipient proposes not only to benefit his own works and to increase the number of his hands, but to extend a similar benefit to every manufactory in the town.

As I have already intimated, there is no pretence of any corrupt bargain on either side. If the town had postponed action, and on some future occasion built the switch, I gather from the figures quoted by the Chief Justice it would have cost them, at the lowest calculation, over \$6,000; as it is, they attain their object at a cost of \$2,800 in deferred payments. Mr. Tilson appears to be the main sufferer by the bargain, although, as he is by far the largest contributor to the taxes, he would in any event have had to pay a large share.

It is said that this is an evasion of the statute, as, if the municipality had been compelled to build the switch, or contribute to it, they must have secured the approval of the majority of the ratepayers. The reason suggested is fallacious, as an appeal to the ratepayers would only have been required in the event of its being necessary to create a debt. If the council, having funds on hand unappropriated, had chosen so to apply them, they could have done so without a popular vote.

But it is not every evasion of an Act of Parliament that is illegal. When Sir Robert Collier was appointed to the Judicial Committee of the Privy Council, there was a very clear evasion of the Act of Parliament which had been passed for appointing additional members to that body. It required that the parties appointed must be specially qualified, that is, as one of the Judges of the Superior Courts at Westminster. He was then Attorney-General, but was appointed a Judge, and immediately thereafter appointed one of the Judicial Committee. No one ever dreamt of questioning the validity of the appointment, but it was a clear evasion.

I think it is a misnomer to speak of this as an evasion.

The council, if in funds, could, without a vote of the people have obtained a railway which all parties with the exception of a very few desired. If they could obtain this advantage at a much less cost in a manner which does not infringe any rule of law, I do not see why they should not do so. The cases which have been referred to in support of the judgment are very distinguishable.

In *Re Barclay and Darlington*, 12 U. C. R. 86, the council had submitted a by-law to the people for the purpose of prohibiting absolutely the sale of liquors which the ratepayers refused to pass, and the council then attempted to attain the same object by limiting the licenses to one house, and that in an unfrequented part of the township, and as the court were satisfied that the council had advisedly attempted to do what they were prohibited by law from doing they quashed the by-law.

In *Bates and Ottawa*, 23 C. P. 32, the council passed a resolution to give away a portion of the corporation fund, and it was held they had no power to make such a gift.

I entirely agree with those cases in which it has been held that no individual is warranted in putting in operation the municipal machinery for his private purposes, and in *Morton v. St. Thomas*, (6 A. R. 323) in this Court I had not, nor had any of my learned brothers I am sure, any intention of casting any doubt upon the ground of decision in the Court below, but on the contrary, whilst affirming that decision to hold that the by-law was open to the further objections which were taken to it in this Court.

No such objection as was held to apply in *Barclay v. Darlington*, applies in the present case. The by-law is perfectly good upon its face, and would have been good if no motive whatever had been shewn on the part of the council in passing it.

It is not pretended that if the council had chosen of its own mere motion to pass the by-law, nothing being said about the quid pro quo, it could have been successfully impeached. It reminds one of the story of the West Indian Judge whose judgment would probably have been

affirmed by the Judicial Committee, as several others had been, if he had, as in the previous cases, omitted to state his reasons.

This application is not strictly within the section of the Act giving power to the Courts to deal summarily with by-laws upon motion, and assuming that it may be open to the Court to interfere upon the principles of the common law in this summary manner, which is not to my mind at all clear, (see the remarks of Robinson, C.J., in *Standley v. Vespra*, 17 U. C. R. 69; *Hill v. Walsingham*, 9 U. C. R. 310,) we can in such a case exercise a discretion and are not bound to quash, and on that ground alone we ought not to interfere.

I am not at all questioning that in some form or other the Courts could interfere in a proper case to prevent the power being abused, and would generally do so by injunction, which would have been much more reasonable than the present proceeding, it being difficult, as pointed out by Sir John Robinson in an early case, to foresee how much inconvenience may be sometimes occasioned by quashing by-laws after they have been acted upon, and pointing out that it is and ought to be a strong reason for declining to quash in such cases except upon very clear grounds.

The statement in the applicants' affidavit that the exemption will amount to \$5,000 is not sustained, on the contrary it is shewn to amount only to a trifle more than half that sum.

It is the fact that the village has benefited to a far larger extent than is usually the result of these exemptions. But the further fact that Mr. Tilson previously to its passage promised to secure those benefits, and has honestly kept his engagement, furnishes no fair ground in my opinion for quashing the by-law.

I am of opinion therefore that the appeal should be allowed.

PATTERSON, J. A.—The grounds on which the judgment in this matter has been attacked cannot be said to be

wanting in force, and they have been ably urged on the part of the appellant municipality, but I think they are outweighed by other considerations.

The by-law does not, on its face, offend against the letter of the statute, 46 Vict. ch. 18, sec. 368 (O.) as amended by 47 Vict. ch. 32, sec. 8, (O.) which empowers every municipal council, by a two-thirds vote of the members thereof, to exempt any manufacturing establishment, or any waterworks, or water company, in whole or in part, from taxation, for any period not longer than ten years; and to renew that exemption for a further period of ten years, and no reason is shewn for supposing that the by-law did not receive a two-thirds vote of the members of the council.

I assume for the present purpose that the flouring and grist mill, and the split pea mill, are manufacturing establishments within the meaning and intention of the section. Their right to be so classed has not been questioned, and I do not say that it is open to question. I simply give no opinion upon the matter.

Our attention was called on the part of the appellants to the valuable advantages gained by the municipality by the arrangement with Mr. Tilson, and the hardship was pointed out of setting aside the by-law several months after its passing, and after he had expended, on the faith of it, a larger sum than all the taxes which it would relieve him from paying.

These are considerations proper to address to the Court as reasons for asking for the exercise of the discretion which, in several of the cases cited to us, it has been affirmed that the Court may properly exercise by refusing to quash a by-law which shews no illegality on its face. But they were considerations for the Court of first instance, and were doubtless urged in that Court. I should have thought them calculated to tell with effect against a charge of illegality depending upon some irregularity or omission in the proceedings leading up to the passing of the by-law, but it could scarcely be expected that they would save the by-law if the illegality established was an attempt to

achieve indirectly, under cover of the supposed literal reading of the powers given to the council, what those powers were not intended to include, and what there was no power to do directly.

It was strongly contended that the by-law was a mere evasion of the law which forbade the granting of a bonus to a railway company unless the by-law for the purpose was submitted to and approved by the electors. The argument was, perhaps, put rather too broadly, because a bonus may be granted without the preliminary popular vote, provided it does not involve the creation of a debt or liability: 46 Vict. ch. 18, sec. 628, sub-sec. 5 (O.) That may be a state of things unlikely to occur often, and in this case it would seem that the \$6,000 required could not have been provided without borrowing, though that is left to inference rather than directly stated in the evidence.

One reason given for making the arrangement with Mr. Tilson was the reluctance that was felt to ask the assent of the electors to any by-law but the one for raising \$4,000 for school purposes. There was therefore a good foundation for the charge of evading, or attempting to evade, the statutory duty of the council.

I am not sure that the illegality thus asserted against the council is not the same thing, in different words, as the reason I am about to give for my judgment. Nor am I prepared to say that my reason differs from that given in the Court below by the learned Chief Justice when he holds it illegal on the part of Mr. Tilson to purchase exemption from taxation, and illegal on the part of the council to anticipate the assessment of future years, and thus live in advance of the income of the municipality.

As the matter presents itself to my mind, the council has only in words, and not in reality, exercised the power conferred by section 368.

It will be noticed that, while the general provision exists that the powers of councils shall be exercised by by-law when not otherwise authorized or provided for—46 Vict. ch. 18, sec. 284 (O.)—yet the form most frequently adopted

in the statute for conferring or declaring the powers is the enactment that the council may pass by-laws for the specified purpose.

That is not the form of section 368, which declares that "every municipal council shall, by a two-thirds vote of the members thereof, have the power of exempting," &c., saying nothing of a by-law.

It may be that a by-law would always be necessary; but the form of the section affords no ground for insisting that the passing of a by-law like the one before us must, of necessity, be proof that the power has been exercised.

The power is not to pass a by-law, like so many of the powers conferred by the Act; it is to exempt from taxation, and that is what has not really been done.

By the arrangement so distinctly proved and so candidly avowed on all hands, Mr. Tilson was not left at liberty to expend in the establishment or promotion of his manufacturing business the money for which he would have been assessable, which is what I understand to be the meaning and object of the exemption of a manufacturing establishment from taxation, but he was bound to spend that money and more upon the railway enterprise.

The bargain may not have been in those terms, but that was the effect of it, and that it was so understood, not in a general way but with special reference to the extent to which the taxes on the mills would go towards the expenditure on the railway, is made very clear by the evidence, and particularly by that of Mr. Tilson himself where he said, after describing the negotiations with the railway people:

"I was subsequently asked by some of the councillors to step into the town's position, and I agreed to do that; I first asked for other exemptions, and the council thought I was asking for too much; subsequently I consented to take exemptions given; I yielded not because I was getting too much, but I wanted the work done."

What the council in the by-law, and the witnesses in speaking of the transaction, call exemption was not exemption, and the power conferred by section 368 was not exercised, and was not intended to be exercised.

It was only by misunderstanding the section, or by supposing it could be made use of to do in appearance what was not done in reality, that the power could be understood to be exercised.

The by-law, being only one part of the transaction, and not deriving any force from a literal compliance with the section which gives no effect to a by-law merely as a by-law, and being framed so as to represent untruly the transaction as a whole, cannot, in my judgment, be supported as an exercise of the power, and it has no other ground to rest upon.

For this reason, and without touching some other topics which, either by way of argument or illustration, were mooted before us and in the Court below, I am of opinion that we should dismiss the appeal.

OSLER, J.A.—The exercise by the council of the powers conferred upon them by the Legislature of passing by-laws in relation to the large class of matters embraced in our municipal system, is expressly made subject to the jurisdiction of the High Court to interfere in a summary manner, and to quash the by-law for illegality. The illegality of which the Court takes notice may be apparent on the face of the by-law, or may arise from something extraneous to it. The term is not defined in the Act, but is general and unqualified, including as well the question of the actual existence of the power to pass the by-law, as as of its *bonâ fide* exercise if it does exist in the particular case. It is their subjection to a large superintending judicial power of this kind, which distinguishes municipal by-laws from Acts of the Legislature, the constitutional validity of which, only, can be inquired into by the Courts. Apart, for instance, from the special power which it was found necessary to give by sections 207, 208, and 337 of the Municipal Act in order to reach the case of by-laws passed by the votes of electors, and carried by means of corrupt practices, I apprehend that a by-law the subject matter of which is within the apparent scope

of the council, but which has been procured, by bribery of its members, or other fraudulent means, is liable to be set aside for illegality, the illegality being the dishonest exercise by the council of the public trust reposed in them. As regards an Act of the Legislature, of course no such examination is possible, of the causes leading to its passage, but the exercise by municipal councils of the authority delegated to them stands for the reason already given in a very different position.

In the United States the Courts have no such statutory jurisdiction as our Courts possess over the legislative acts of municipal bodies, and therefore, the analogy between their by-laws and the Acts of the Legislature is closer than it is with us as regards the want of power in the judicial branch, to examine into the motives which actuate the Legislature. On this subject, however, Mr. Dillon remarks :

“But it would be disastrous, as we think, to apply the analogy to the full extent. Municipal bodies like directors of private corporations have too often shewn themselves capable of using their powers fraudulently for their own advantage, or for the injury of others. We suppose it to be a sound proposition that their Acts, whether resolutions or ordinances, (by-laws) may be impeached for fraud at the instance of persons injured.” *Dillon on Municipal Corporations*, 3rd ed., sec. 311.

Many of the authorities on this subject are reviewed by the learned Chief Justice of the Queen's Bench, in *Fenton v. The Corporation of Simcoe*, 10 O. R. 27; and I may refer in addition to *Re Barclay and Darlington*, 12 U. C. R. 86; *Pells v. Boswell*, 8 O. R. 680; *Re Morton and St. Thomas*, 6 A. R. 323; *Re Baird and Almonte*, 41 U. C. R. 415; *Re Vashon and Hawkesbury*, 30 C. P. 194; *Hewison v. Pembroke*, 6 O. R. 170; *Re McLean and Ops*, 45 U. C. R. 325; *Re Romney and Mersea*, 11 A. R. 712, per Burton, J. A.

The clause of the Act under which the defendants professed to pass the by-law in question in this case is the 368th, as amended by 47 Vict. ch. 32, sec. 8 (O.) It is found in the division of the Act, which relates to by-laws respect-

ing yearly rates. That section enables the council to exempt from the equal general assessment, which by sec. 359 is required to be made upon the whole ratable property within its jurisdiction, certain descriptions of property, *inter alia*, manufacturing establishments, or rather, any manufacturing establishment.

The section contains no preamble, but it requires none to see that it is in *pari materia* with sec. 482, sub-sec. 10, and that its object is the encouragement of manufacturing establishments. It is *as* manufacturing establishments that they may be exempted, and upon the consideration that it is desirable to promote and encourage the particular industry by relieving it from the burden of taxes. That must in every instance be the direct and meritorious cause of the exercise of the powers of the council under this section.

It can not be supposed that, under the cloak of exempting a manufacturing establishment from taxes, the council can, for instance, raise money in any particular year, or for a particular purpose, by discounting the future taxes and exempting the property of a manufacturer therefrom, in consideration of a present payment. The exemption is to be *given*, not *bought*, for when it is bought it ceases to be an exemption, and the power to grant it is used for an illegitimate purpose.

It is not easy to suppose a case in which it could be more directly and clearly proved than it has been here that the exemption was granted for an indirect and improper reason, *viz.*, not because the council thought that *as* manufacturing establishments Mr. Tilson's industries ought to be exempted, but because he undertook to carry out a scheme which they had no means in hand to pay for, and which they believed the municipality would have refused to be taxed for. The result is, that the taxes, from which there is no reason to suppose he would ever have been exempted, are thrown upon the general body of the ratepayers, who thus indirectly bear a burden which they would not otherwise have been subjected to.

The injustice which such a by-law as the one in ques-

tion may work upon other manufacturers whose industries may be quite as worthy of protection, but who may not be in so good a position to obtain it, is obvious. I do not believe that either Mr. Tilson or the council were actuated by sordid or low motives, but the question is one of principle, and if this by-law can be upheld, a way is opened for much indirect and corrupt action between councils and those who have dealings with them.

I think the council in this case have exercised their power under circumstances and in a manner neither contemplated nor authorized by the Act, and therefore concur in dismissing the appeal.

Appeal dismissed with costs,

BURTON, J. A., *dissenting.*

MCLAUGHLIN V. SCHAEFER.

County Court, jurisdiction of—Liquidated damages—Unliquidated damages.

The plaintiff purchased by sample from the defendant two lots of barley consisting of 10 and 5 car loads respectively. On receipt of the first lot, the plaintiff, alleging that the bulk did not correspond with the sample, claimed \$200 for inferiority in quality. The defendant disputed any liability, and the plaintiff threatened to dishonor the draft which had been drawn on him for the price. In order to sustain his credit with the bank, the defendant telegraphed the plaintiff to accept, and that he would accept plaintiff's draft for the \$200. The defendant's draft, for the price, though the defendant was not aware of it, had then been paid by plaintiff.

A deduction of \$100 from the price of the second lot of 5 car loads was subsequently demanded on the same ground, and the plaintiff refused to pay the defendant's draft for that lot unless he sent a cheque for that amount and instructed the bank to pay the plaintiff's dishonored draft for \$200 claimed in respect of the first lot. The defendant telegraphed the plaintiff, "Accept my draft. Will be down Wednesday and pay you."

The plaintiff having paid the second draft, sued the defendant in the County Court for \$300.

Held, [reversing the judgment of the Court below] *Per* BURTON and PATERSON, JJ.A., that the sums of \$200 and \$100 were both liquidated by the act of the parties; that the whole demand was therefore within the jurisdiction of the County Court, and that plaintiff was entitled to recover.

Per HAGARTY, C. J. O.—Without deciding that either demand was liquidated, the Court in this case had jurisdiction. It cannot entertain any unliquidated cause of action over \$200; but it has jurisdiction to try any number of unliquidated causes of action in debt, covenant or contract so long as each does not exceed \$200, and the aggregate does not exceed \$400.

THIS was an appeal from the judgment of McDougall, J., of the County Court of the county of York.

The action was brought to recover from the defendant the sum of \$300, alleged to be liquidated damages for a breach of contract on the sale of fifteen car loads of barley by the defendant to the plaintiff, the same not being up to sample.

The case came on to be tried before His Honor at the September sittings of the Court, 1885.

At the conclusion of the plaintiff's case, *Shepley*, for the defendant, moved for a nonsuit on the grounds amongst others:

1. That there was no jurisdiction to try the case in the Court, as from the evidence it was clear that the damages

were unliquidated, and not ascertained either by the signature of the defendant or by the act of the parties.

2. That no valid contract or agreement was shewn to pay any specified sum, and if plaintiff relied on defendant's telegram of November 1st, which was:

"I accept your draft, you accept mine, and wire my bank at once."

it was not evidence of the defendant's having agreed to pay \$200 as liquidated damages for the inferior quality of a quantity of barley sold by defendant to the plaintiff, because the telegram was at best a mere agreement to accept a draft, and was obtained by the improper representation on the part of the plaintiff, that the defendant's draft on him, the plaintiff, for \$3,329.24, the price of the barley, was still outstanding and unpaid, and that unless the defendant either accepted or promised to accept the draft for \$200, as representing the plaintiff's claim for damages, the defendant's draft on him would be allowed to go to protest. The fact, however, was, that at the time when these representations were made by the plaintiff, the plaintiff had already accepted and paid the defendant's draft for the price of the barley, and there was, therefore, a total failure of consideration for any promise or agreement on defendant's part.

Upon these grounds he contended the plaintiff must fail in the action.

The learned Judge reserved judgment and afterwards dismissed the action with costs, holding that no portion of the damages claimed therein was ascertained or liquidated by the act of the parties or the signature of the defendant and that therefore the Court had no jurisdiction.

The appeal came on to be heard before this Court on the 9th of March, 1886.*

Wallace Nesbitt, for the appellant.

Shepley, for the respondent.

**Present.*—HAGARTY, C.J.O., BURTON and PATTERSON, JJ.A.

The other facts appear in the judgment of Patterson, J.A.

APRIL 21, 1886. HAGARTY, C.J.O.—With certain named exceptions the County Court has jurisdiction in all personal actions where the debt or damages claimed do not exceed the sum of \$200.

2. In all causes and suits relating to debt, covenant, and contract to \$400 where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant.

I feel great difficulty in holding that under these clauses an unliquidated claim not exceeding \$200, and another of exactly the same character for a separate cause of action may not be recoverable.

It appears to me that the Court cannot entertain any unliquidated cause of action over \$200, but that it has a jurisdiction to try any number of unliquidated causes of action in debt, covenant or contract so long as each of them does not exceed \$200, and the aggregate sought to be recovered does not exceed \$400.

If we hold otherwise it must follow that if there be an unliquidated account for goods, &c., of say \$199, and an account for money lent or paid, also unliquidated of \$20, the latter cannot be gone into without exceeding the jurisdiction.

The claims are perfectly separate, and sought to be recovered on separate counts. In my opinion each count must be treated and tried separately, and the question of jurisdiction depends on the nature of the claim in each count, and if each of them be in itself within the jurisdiction there can be no objection to trying them so long as the aggregate does not exceed \$400.

I think we cannot say that because adding the amount sought to be recovered in the two counts together, we find an unliquidated amount over \$200, that therefore the jurisdiction is ousted. We are bound, in my judgment, to treat them as wholly distinct.

But we are not called on to decide anything as to counts in tort joined to counts in debt or on contract.

If we must read the second clause of the Act as wholly independent of the first section, and as merely giving a jurisdiction up to \$400 when the amount is liquidated, that might apparently exclude all unliquidated claims, and the general jurisdiction of the first clause up to \$200 cannot be resorted to.

If this view be correct, my decision in *Vogt v. Boyle*, 8 Pr. R. 249 was clearly wrong. There it was held that \$300 on a liquidated claim, and \$99 on an open account, could be recovered. My recollection of that case is, that I, before giving judgment, consulted some of my learned brethren as to the practice.

I think we must read the two jurisdiction clauses together, and that the second clause, giving a jurisdiction up to \$400, must be read as authorizing the trial of two, three, or more unliquidated amounts, no one of them exceeding the general jurisdiction up to \$200, and the aggregate not exceeding \$400.

The Legislature considers the Court competent to determine any unliquidated amount to \$200. It is the nature of the particular claim that has to be considered, not the number of the claims; and the whole enactment must, I think, be properly read as this:

"You may try any claims to \$200, liquidated or unliquidated, and in debt, covenant or contract where the amount is liquidated you may go to \$400."

This, in my judgment, gives the power to try a dozen separate unliquidated claims, in debt or contract, none of them exceeding \$200 and the aggregate not over \$400.

Jordan v. Marr, 4 U. C. R. 53, was decided on 8 Vict., chap. 13. The clause reads that "the Courts shall hold plea in all causes or suits relating to debt, covenant or contract, to the amount of £25, and in cases of contract or debt on the common counts, when the amount is ascertained by signature of defendant, to £50," &c.

Mr. Justice Jones, who had been a County Court Judge, says at page 79, "Since the establishment of district courts, in 1822, a plaintiff has been permitted to recover to the

full extent of the jurisdiction, that is £40 (before the late Act, and after the Act of 1822), his claim consisting (in *assumpsit*) of an unliquidated account or damages to £15, and a liquidated claim such as a promissory note to £25, making together £40, the damages at the conclusion of the declaration being laid at the latter sum." He proceeds to state that this construction had been sanctioned by the Court, when certificates for Queen's Bench costs were refused on the ground that any sum less than £40 could be recovered in the District Courts when the amount of an unliquidated claim did not exceed £15.

Sir James Macaulay dissented from Sir J. Robinson and Jones, J., holding that (on motion to arrest the judgment) it must appear that the amount is ascertained by signature when the sum sought to be recovered exceeds £25. He says, at page 74: "Nor do I see that the present Act is susceptible of such a construction, unless by holding that it, in the first place, confers a jurisdiction in all the cases enumerated to £25, and *beyond* that, up to £50, when the amount, exceeding £25, is ascertained by the signature to £50, in effect requiring half only, and not the whole amount to be so ascertained."

The judgments are very elaborate and instructive.

McMurtry v. Munro, 14 U. C. R. 166, may be referred to, especially the judgment of Burns, J.

I think I must either hold as above or accept the only alternative, viz., that the 2nd sub-section only applies to one cause of action liquidated or ascertained up to \$400, and that it must be read without reference to the preceding clause as to \$200. I think this case is within the County Court jurisdiction.

As I think the case must be remitted to the County Court for final disposition, I do not feel it necessary to discuss the other branch of it.

I do not feel as clear as my learned brothers that the amounts sought to be recovered are liquidated by the act of the parties, and for that reason I rest my judgment on the general question of jurisdiction. It will be for the County Court to decide, in my opinion, whether the defendants unequivocally agreed to accept drafts, or, in

other words, to pay as the admitted amount of damages for the alleged deficiency in quality of the barley, or whether it was merely accepting drafts for both or either of the claims to abide the result as to alleged deficiencies.

As the case will be remitted to the Court below I presume further evidence will be taken and this question decided.

In my view, it would be open to the plaintiff to recover both the \$200 and the \$100 as damages, respectively, for deficiencies in the shipments of the barley, whether drafts were or were not agreed to be accepted. If a vendor like defendant, instead of agreeing to accept a draft for a named amount of damage, had agreed to deposit, or had actually deposited sums respectively of \$200 and \$100 in the hands of a third person to protect the plaintiff to that amount if the barley should prove deficient, I could hardly call either of these amounts liquidated in the sense of the statute. His breach of an agreement to accept the plaintiff's drafts therefor, if to abide a like contingency, would not, as I understand, make the amount claimed as damages liquidated.

PATTERSON, J. A.—The plaintiff's claim is for two sums of \$200, and \$100, respectively, as compensation for the alleged inferiority of two lots of barley bought by him from the defendant to the sample by which they were bought.

The defendant denies his liability on grounds set out in his statement of defence, and adds, by way of plea to the jurisdiction, a paragraph which reads thus :

"6. The defendant submits that this Court has no jurisdiction to inquire into the matters in question in this action, inasmuch as the plaintiff seeks to recover unliquidated damages to an amount in excess of the amount to which this court has jurisdiction in actions to recover unliquidated damages."

The action came on for trial before the learned judge of the County Court, and the plaintiff's evidence was given. It consisted of correspondence by letter and telegraph, and

the testimony of himself and his agent who had acted for him in buying the barley.

Upon this evidence the learned Judge, after consideration, held that the amounts claimed were unliquidated, and that he had therefore no jurisdiction to proceed with the case. He was also of the opinion that the promise relied on to pay the \$200 amount was without consideration; and he gave judgment, dismissing the action with costs.

The question of the demands being liquidated by the act of the parties or unliquidated, depends principally on the correspondence.

The defendant was purchasing grain in the county of Huron, and the plaintiff in Toronto agreed to buy from him ten car loads of barley. Mr Woodcock, the plaintiff's agent, saw the barley on the cars, and reported it inferior to sample, sending to Toronto samples taken from the cars. The defendant drew on the plaintiff for \$3,329.24, the full price of the ten cars of barley, and then the correspondence which is before us began.

The first communication is a despatch dated October 22, 1884, from the plaintiff to the defendant:

"Samples compared. Bulk not nearly up. Cannot accept draft. Better come down. Told you to be careful."

On the same day the defendant replies:

"Woodcock inspected and found barley correct before cars left. You better accept draft, and not make more trouble. Cannot go down. Five more cars ready."

Then the following day, 23rd October, the plaintiff writes:

"DEAR SIR,—I am always willing to meet you fairly and squarely, but I cannot assume such risks as you seem inclined to put me to. I have showed the sample bought by, and the sample of the bulk, to several here in the trade, and they all agree that it would be folly to attempt to fill the bill. If you had come down here I think I could have satisfied you without any trouble. To avoid all such occurrences in future I imagine it would be best for us to deal no more, as so far, our deals have only cost me expense and trouble. I have wired Mr. Woodcock to

accept the other five you have if they are all right, but otherwise to have nothing to do with them. I enclose you bill for the balance of this deal."

On the 24th the defendant telegraphs :

"Accept draft, and if any loss will make right."

Another draft for the price of the five car loads will be spoken of presently ; but we may here note the undertaking to make right any loss on the larger purchase. This despatch is only introductory to the evidence relied on to prove that the \$200 claimed is a liquidated amount, but it is material on the question of the consideration for the alleged promise to pay the \$200.

On the same 24th October, the plaintiff telegraphs to the defendant :

"Will accept your draft if you will accept my draft for \$200 difference."

The fact is shewn that the plaintiff accepted the \$3,329.24 draft on 23rd October, and that it was paid at the bank on the 24th. It is not made clear that it was paid by the plaintiff himself, or that he knew at the time of its being paid. He speaks in his evidence of the possibility of its having been paid in his absence by his bookkeeper, but it is not proved that the bookkeeper paid it, or paid it without the plaintiff's knowledge. If we give the plaintiff credit, which the learned Judge in the Court below seems to have doubted his right to receive, for intending to deal truthfully with the defendant, it is not easy to reconcile the correspondence of the 25th of October, with knowledge on the plaintiff's part that the draft was paid on the 24th ; but by reason of what afterwards occurred, this is not of much consequence.

On the 25th the defendant telegraphed : "Can you meet me Stratford, Monday. If anything wrong will settle then. Be sure accept draft," and the plaintiff answered by telegraph : "Cannot accept barley draft ; would get me into trouble. If you leave margin, will sell on your account and do best I can. Immediate reply or draft protested." And he followed this up by the following letter on the same date :

"DEAR SIR,—To-day I draw on you for \$200, and I hope you will go to the Molson's Bank, Exeter, and pay it on receipt of this. I have explained pretty fully to you in what a bad position you have put me with the shipment, but I don't want to go back on you ; if you pay this \$200 I will pay your big draft, not otherwise.

Trusting that this will be the last unpleasantness, have made the draft at Molson's, so that you can pay it without O'Neil knowing anything about it. Wire on receipt, as I don't intend to accept your draft on such a risk."

Then a week passes without any communication so far as shewn to us. There is no reply from the defendant to either the letter or the telegram of the 25th. We cannot say what explanation the plaintiff might give if examined ; but finding his anxiety about the payment of his draft so suddenly abated, the natural inference is, that he knew what, as a business man, he must have known, that the draft was paid.

The ten car loads of barley had gone on to Rochester. It is in the evidence that the plaintiff had directed the defendant to send them there in the event of the barley being approved of by Woodcock, and that Woodcock had consented to them going on at the earnest request of the defendant, and on his assurance that he would make good any deficiency of quality. Therefore, while the plaintiff had not accepted the barley as satisfying the contract by being equal to sample, it was too late, even at the beginning of the correspondence, to reject the barley altogether. The second lot of five cars was different in this respect.

We have, under date of 31st October, a telegram from the defendant to Woodcock, which does not directly affect the matter at present in discussion. Its words are :—"Cannot go. If any difference will make right next lot. Have five cars barley ready for you." We shall find these five car loads again spoken of. They are a third lot, and are entirely distinct from the five previously mentioned, and I believe were not ultimately bought by the plaintiff.

The next correspondence between the parties themselves is on the 1st November. On that day the plaintiff writes to the defendant:

" On receipt of this I would like to have your explanation of your silence regarding the \$200 draft matter. If you are in the habit of doing business with every one as you try to do with me, I imagine you will soon have none left. In the present instance I don't care to be stuck with your barley, *and if you don't pay my \$200 draft at once, I will leave your hands.* It is a most extraordinary thing that in nearly every transaction I have had with you there has been some hitch. Waiting your early reply.

The barley which is here mentioned is evidently the second lot, not the first lot which had been paid for, nor the third lot which was offered to Woodcock by the telegram of the 31st October.

There is a telegram of 1st November, from the defendant to the plaintiff, saying "I accept your draft, you accept mine, and wire my bank at once." This was most likely sent before the receipt of the plaintiff's letter of 1st November. The two drafts alluded to are the plaintiff's draft for \$200, and the defendant's draft for \$1,914.59 for the five car loads.

The subsequent correspondence, still leading up to the point of the liquidation of the claims by the act of the parties, deals with three things, viz, the \$200 draft on the defendant; the \$1,914.59 draft on the plaintiff; and the plaintiff's demand for a rebate of \$100 from the latter amount for inferiority of the smaller lot of barley.

On the 5th of November, the plaintiff writes to the defendant, saying:

"DEAR SIR,—Your returned draft has just been presented and I will protect it, if, on receipt of this, you send me a cheque for \$100 to cover, otherwise I shall be forced to let it go back again. On receipt of this wire me what you are going to do, as I refuse to pay any more of your drafts without first being protected from risk. Your ten cars have been refused, as no doubt you know, and my loss on them will be over \$300. I cannot understand the plan on which you and Mr. Woodcock compare samples, and in future it will be better for you to send me samples direct, and I will go up and inspect. If you choose to take my offer, 55 cents on your remaining five cars, you can deduct the \$100 above mentioned from draft, if not, remit me a cheque, but answer by wire which you are going to do.

If you accept at 55 cents I enclose you instructions to enable to ship at once from me to order O'Neil's Bank, Rochester, in Whitney Elevator, *via* Blk. Rock & N. Y. C. advise D. E. McKee."

On the same day the defendant telegraphs to the plaintiff:

"Take up draft and will remit you middle next week; don't want bankers know; accept mine; reply Kippen to-night."

And the plaintiff replies:

"All right, will pay your draft if you send a cheque, or if you put in the other five cars deduct one hundred from draft."

The defendant did not comply with these terms, and on the 7th of November the plaintiff telegraphs as follows:

"Bank notify \$200 draft returned; won't pay your draft unless you have Bank authorized accept \$200 less amount, less two hundred, and remit promised cheque one hundred, answer immediately."

The answer comes the next day, 8th November, which was a Saturday:

"Accept my draft; will be down Wednesday and pay you; don't want Bank know; will have other five cars ready Monday; come inspect."

This closes the correspondence. The plaintiff paid the \$1,914.59, and now sues for the money which was promised, but was not paid, on Wednesday, 12th November, 1884, *viz.*, the amount of the dishonored draft for \$200, and the \$100 for which the cheque was demanded.

To say that the despatch contains a promise to pay those sums, is to say that the amounts are liquidated by the act of the parties; and this is the same whether the amounts are payable absolutely or only upon the happening of some event, as *e. g.*, the proof that the goods were inferior to the sample.

Strictly speaking, we have, on this appeal, only to decide whether or not the claim is for a liquidated amount, but the question of the consideration for the promise is also raised, and it depends on the same evidence.

We do not know with certainty whether the defendant intended to adduce evidence on his behalf if the learned judge had thought he had jurisdiction. While therefore

therefore hold the construction which was affirmed in *Vogt v. Boyle*, to be unimpeachable, whatever force we might otherwise be inclined to give to the reasoning of Macaulay, J., in *Jordan v. Marr*.

I am not prepared, however, to assent to the proposition that the statute can be so read as to recognise a jurisdiction in the County Courts to entertain actions for several unliquidated demands which in the whole exceed \$200. So to read the statute would be, in my judgment, to treat the jurisdiction as practically unlimited so long as no one of the combined causes of action by itself exceeded \$200. I do not think the language, fairly read, would point to \$400 as the limit, because that is the limit only when the demand is liquidated. I do not say that by regarding each such claim as a distinct cause of action it might not be possible to bring this unlimited jurisdiction within the letter of the statute, but I say, as Sir J. B. Robinson said on the same subject in *Jordan v. Marr*, "the statute, so far as I know, never received such a construction, and I have no idea that it was intended to be so understood."

Since the remarks just read were written, the Act 49 Vict., chap. 15, (O.) amending the Division Courts Act has been passed. The jurisdiction of the Division Courts, it will be remembered, is up to \$60 in all personal actions, and up to \$100 on claims and demands of debt, account or breach of contract or covenant or money demand, and to \$200 on claims for the recovery of a debt or money demand when the amount is ascertained by the signature of the defendant or of the person whom as executor or administrator the defendant represents; R. S. O. chap. 47, sec. 54; 43 Vict., chap. 8, sec. 2 (O). The new Act allows a plaintiff to combine in one action claims of the first and second of these three classes, provided the amount claimed in respect of the first class does not exceed \$60, and that the whole amount claimed in respect of the two classes combined, or in respect of the second class when no claim is made in respect of the first class, shall not exceed \$100. This legislation apparently forbids the application

to the Division Courts of the principle of *Vogt v Boyle* to the extent of allowing a claim ascertained by signature to be joined with a claim not so ascertained if the combined claims exceed \$100, modifying in this respect the effect which would, in accordance with *Vogt v. Boyle*, have probably been given to the Act of 1880; but the principle of that decision will still apply to the jurisdiction of the county courts.

The formal judgment will be to allow the appeal, with costs; set aside the judgment dismissing the action; and direct the finding to be entered, as part of the final judgment; that the amounts claimed of \$200 and \$100 are liquidated by the act of the parties; and that the costs of the argument in the Court below be allowed to the plaintiff on the final taxation of the costs of the action.

BURTON, J.A., concurred with PATTERSON, J.A.

Appeal allowed, with costs.

RE UNION FIRE INSURANCE COMPANY.

Winding-up Act—Liquidator—Order appointing—45 Vict. ch. 23, (D.); 47 Vict. ch. 39, (D.)

An order was made by PROUDFOOT, J., in the Chancery Division of the High Court directing the winding-up under 45 Vict. ch. 23, (D., 1882,) of a fire insurance company incorporated by the Legislature of Ontario, and against which proceedings had previously been taken under R. S. O., ch. 160, and the "Joint Stock Companies' Winding-up Act, (O.)" This order appointed the receiver in the former proceedings *interim* liquidator, and further referred it to the master to appoint a liquidator, &c., and to settle the list of contributories; and further provided that certain accounts and inquiries which had been made under the previous proceedings, should be incorporated with and used in the winding-up proceedings under the Dominion Statute, in so far as they could properly be made applicable.

Held, (1) that this was an order from which an appeal would lie under sec. 78 of the Act of 1882: (2) (affirming the judgment of the Court below) that 47 Vict. ch. 39, sec. 2 is not limited in its application to companies being wound up at the date of 45 Vict. ch. 23; it applies also to companies in liquidation that is, insolvent though not technically being wound up, but against which proceedings are being taken to realise their assets and pay their debts; but *Held*,

Per HAGARTY, C. J. O.—Although a valid winding-up order must contain the appointment of a liquidator, the order in question can be upheld as containing the appointment of a provisional liquidator merely, but it was wrong in directing a reference to the master to appoint a liquidator, and also in not providing for notice to creditors, &c.

Per BURTON, and OSLER, JJ. A.—It is essential to the validity of such an order that the liquidator should be appointed in it: Such power of appointment cannot be delegated, but must be exercised by the Judge or officer in making that order.

Per PATTERSON, J. A. It is not essential to the validity of a winding-up order that the liquidator should be named in it; and a reference to the master for the purpose of appointing one is proper.

THIS was an appeal by the petitioner William Shoolbred, from the judgment of Proudfoot, J., reported 10 O. R. 489, and came on to be heard on the 22nd of April, 1886.*

The facts are clearly set forth in the former report and in the present judgments.

W. Cassels, Q.C., and W. H. Walker, for the appellant.
Bain, Q.C., Foster, Q.C., and Shepley for the respondents.

June 30, 1886. HAGARTY, C. J. O.—I am of opinion that the learned Judge below was right in the 1st paragraph of his order of 27th January, 1885, adjudging that

**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ. A.

this company was insolvent within the meaning of the statute, and that its business should be wound up by the Court under the provisions of the said Act and its amendments. I adopt his reasons therefor.

I have not been able to see my way to disregard what seems to me to be the plain meaning and effect of the amended clause.

"The Court in making the winding-up order must appoint a liquidator, or more than one liquidator of the estate and effects of the Company, but no such liquidators shall be appointed unless a previous notice be given to the creditors, contributories, shareholders, or members in the manner and form prescribed by the Court."

With great respect for my learned Brothers' view to the contrary, I cannot see how, with such plain words before us, we can consider that this direction is fulfilled by making a winding-up order and referring it to the master to appoint a liquidator.

I do not propose to discuss any question as to the right of the Court to depute its authority to the master in this or any other case.

I decide it on the words of the Act, that to make a good winding-up order, that order must contain the appointment of a liquidator. Leaving a reference to the master wholly out of the question, I think the learned Judge could not make a valid winding-up order to day, and defer to a future day before himself or any other Judge, the appointment of the liquidator.

I also think that on the application of the creditor, and on notice to the company only, the petition may be presented and the Judge will, as it were, become fully seized of the matter, and may adjourn its consideration, "and make any interim or other order it deems just." It may, I think, direct notice to be given to the creditors, contributories, &c., to appear on a future day for the appointment of a liquidator.

All these proceedings should, I think, precede the making the order to wind up, and the appointment of the liquidator.

But I am not at present prepared to hold that a case

may not be presented to a Judge shewing the necessity of prompt action for the preservation and protection of assets, &c., and that the Judge might feel it necessary to stop all further business dealings of the company or the transfer of its shares, &c., and that a person should be at once named as a provisional liquidator. It is true that by section 12 the winding-up of the business is deemed to commence at the service of notice of petition. The object of the statute might be defeated if he must wait till notice had been given to creditors, &c.

Sec. 30. "The Court may at any time after the presentation of the petition, and before the first appointment of a liquidator, appoint provisionally a liquidator of the estate and effects of the company."

In the case before us the order appoints the receiver previously appointed in the case of Clarke against this company to be "the interim liquidator of the estate and effects of the said company."

It was clearly not intended that this receiver should occupy anything beyond a mere temporary position, as the next paragraph of the order refers it to the master "to appoint a liquidator of the estate and effects of the company, and to fix and allow the security to be given by him and the remuneration payable to him," &c.

Assuming that a valid winding-up order must name a liquidator I am not prepared to say that the Act is not substantially complied with by naming a provisional or interim liquidator. The objections to this would be that such appointment is made without notice to creditors and others.

To this it may be replied that the statute does not require such notice as a condition precedent to the making the order, but to the appointment of the liquidator.

I think we may fairly construe sec. 24 as referring to the general liquidator, and not a mere provisional or interim appointment under sec. 30.

I think this section extends the power of the Judge to act, if necessary, on emergency, and that the words "before

the first appointment of a liquidator " means the liquidator referred to in section 24, of whose appointment notice must be previously given.

All questions as to the general fitness of the liquidator, his securities and remuneration are reserved for consideration of all parties interested after notice has been given under the direction of the Court.

I think a fair construction of the Act, and its purposes fully warrant the conclusion that this order may be upheld as containing the appointment of a liquidator, provisional, till the due appointment of the liquidator mentioned in section 24.

I do not see how section 3 of the order can be upheld in its present shape as apart from the objection of a reference to the master—it does not provide for notice or direct what is to be the notice to the creditors and contributories.*

Removing this section 3 from the order, there seems to be nothing to prevent another order being made with a view to the appointment of the regular liquidator on due notice to all parties interested.

I think the order can be supported except as to section 3.

BURTON, J. A.—This is, I think, by no means so technical a matter, speaking generally and without reference to the special facts of this case, as it would at the first blush appear.

If the respondent's view be correct a company may be placed in liquidation without any notice whatever to the shareholders or creditors of the company, by a secret arrangement between a particular creditor and the managing body of the company.

* Section 3 was as follows : " And this Court doth further order that it be referred to the Master in Ordinary of the Supreme Court of Judicature to appoint a liquidator of the estate and effects of the said company, and to fix and allow the security to be given by the liquidator, and the remuneration payable to him, and to the said interim liquidator."

The framers of the Act probably intended that the machinery for carrying out the enactment should, in the main, be provided for by rules or General Orders under section 97, as is the case in England under the Companies' Acts there in force; and it is perhaps to be regretted that no such rules have been made. In the meantime we must ascertain, as best we can, the meaning of the sections of the Act regulating the winding-up from the language there employed; and taking sections 13, 14, and 24 of the act of 1882 together, it is, I think, reasonably clear that it was not the intention of the Legislature, that any winding-up order should be made until notice had been given to the creditors, contributories, members, and shareholders of the company.

It is said on the other hand that section 14 contemplates the making of the winding-up order forthwith, on the presentation of the petition if the Courts think fit to do so, but this does not necessarily conflict with my reading of the Act, as it might be possible that the party moving for the order had taken the precaution to give notice to the creditors and contributories of his intention to apply for the order, and all parties being represented, the order might properly go at once.

It strikes me as a very harsh proceeding that a winding-up order should be made without notice to the parties mainly interested, but that is no reason for saying that, if the words employed by the Legislature plainly and obviously have that clear meaning and shew that that was intended, harsh as it may appear to us, we should not give them that effect; but have they so expressed their meaning?

It could scarcely have been in their contemplation to render the assent of the shareholders necessary to so comparatively trifling a matter as the selection of a liquidator, and to have allowed an order which in effect terminates the existence of the company and destroys the value of their interest in it to go without any notice to the parties mainly interested.

The appointment of an interim or provisional liquidator

stands upon a different footing: as the title implies, it is an appointment of a temporary nature like that of an interim assignee to take charge of and protect the estate until a winding-up order can be made and a liquidator duly appointed.

I do not understand that upon the appointment of an interim liquidator the business of the company is to cease, but that is to follow upon the making of the winding-up order and the appointment of the liquidator then to be made.

I should think, therefore, that the order in this case was not warranted unless the respondents can be held to be within sections 2 and 3 of the 47th Vict. ch. 39, which enacts that if a company was, on the 17th May, 1882, "in liquidation, or in process of being wound up any shareholder, creditor, assignee, receiver or liquidator, of such company may apply by petition to the Court, asking that the company be brought within and under the provisions of the said Act, the court may make such order, and the winding-up of such company shall thereafter be carried on" under the Dominion Act.

It was somewhat doubtful what companies were intended to be included under the 45th Vict. The words were incorporated banks, insurance companies, building societies having a capital stock, which are insolvent or in process of being wound up *either under a general or special Act*. In the 47th Vict. the words in italics are omitted, and the section, as amended, includes the incorporations I have just referred to, and adds: "Incorporated trading companies doing business in Canada, no matter where incorporated, and which are insolvent or in process of being wound up, who, on petition, as by this Act provided, ask to be brought within and under its provisions."

The language employed does not strike one as the happiest that could have been selected to include a company like the present whose affairs were being administered in the Court of Chancery, but they are very wide and susceptible of such a meaning, and on referring to the

debates at the time the amended bill was introduced we find that the words "under a general or special Act" were omitted with a view to extend its operation to such a case. I do not, in so referring to them, intend to give any countenance to the idea that we are at liberty to consider the intention of a member of Parliament by whom a bill has been introduced in construing its meaning, but having come to the conclusion that the words are wide enough to include such a case, and that the general policy of the law would be to extend the provisions of this general measure to all cases of liquidation of insolvent companies, it is some satisfaction to find that the interpretation placed upon it is that which was intended by the House.

I am of opinion, therefore, that this was a company insolvent, and in course of liquidation within the meaning of the Act of 1884, and that the order might have been made under it, but I think it was essential to the validity of such an order, as under the original Act, that the liquidator, that is, the permanent liquidator, should be named in it.

I agree with my brother Osler that an appeal lies.

Whilst in cases under the Act of 1882, the provisions of section 24 appear to me essentially important, as in my view intended to secure to parties interested in the company alleged to be insolvent and sought to be wound up, the opportunity of being heard against a proceeding so disastrous to their interests as a winding up of the company, that reason does not exist in a case like the present where the company is already in the hands of a receiver. I agree, therefore, that in this case the objection is of a very technical nature and am quite willing to concur with my learned brothers in allowing the appeal, without costs; and refer the petition back to the learned Judge.

PATTERSON, J. A.—This appeal is, in effect, from an order made by Mr. Justice Proudfoot, on 27th January, 1885, for the winding up of the company under the Dominion statute 45 Vict. ch. 23.

The same order appointed William Badenach, interim liquidator of the estate and effects of the company, describing him as the receiver appointed in the case of *Clarke v. Union Fire Insurance Co.*; and further referred it to the Master in Ordinary to appoint a liquidator, and to fix and allow the security to be given by him, and the remuneration payable to him and to the interim liquidator, and to settle the list of contributories, take accounts, &c.

The order went on to direct that the costs of the petition upon which it was made, and of the order and the reference thereby directed, and of the winding-up proceedings, should be paid to the petitioners and liquidator out of the assets of the company; and further, that the costs of the plaintiff in the action of *Clarke v. The Union Fire Insurance Co.*, and of the company, which were provided for in the judgments in that action and had not been taxed and paid, should be taxed and paid out of the assets of the company. Then there were two further directions concerning the action of *Clarke v. The Company*, viz., that the accounts and inquiries made under the judgments and references, including the proceedings to ascertain who were the shareholders of the company, and the evidence taken in connection with those proceedings, should stand and be incorporated with and used in the winding up proceedings under the order and reference, in so far as they could properly be made applicable by the master in the proceedings before him; and that the parties who had contested their liability to be settled on the list of shareholders by the master should be at liberty to apply to the Court after the settlement of the list of contributories, for payment of such costs in the action of *Clarke v. The Company* as they might deem themselves entitled to.

William Shoolbred, who is alleged to be a shareholder in the company and a creditor, presented a petition to have the order of 27th January, 1885, discharged and vacated, or in any event varied by striking out the portions by which the proceedings in *Clarke's* action were

adopted and costs granted to the defendants prior to the claims of creditors.

That petition was dismissed, with costs, by Mr. Justice Proudfoot, by an order made on the 11th of November, 1885. The appeal is nominally from that order, but in effect from the principal order of the previous January.

The reasons assigned for the prayer of the petition are thus summarised by the learned Judge in his judgment:

"1st. That notice should have been given to Shoolbred before making the winding-up order. 2nd. That there are no proceedings taken under the Act upon which the order could be made. 3rd. That there was no power to refer it to the Master to appoint a liquidator. 4th. That some of the parties are not before the Court who were made parties to the action of *Clarke v. The Union Fire Insurance Co.*, by order of November 29th, 1882. 5th. That there was no power to adopt the proceedings in *Clarke v. The Union Fire Insurance Co.*, as that was not a winding-up proceeding."

The company was incorporated by Act of the Legislature of Ontario, 39 Vict. ch. 93, which was passed on 10th February, 1876.

The 16th section of that Act provided for the winding-up of the affairs of the company by decree of a Court, upon application by the Attorney General; but that proceeding does not appear to have been resorted to.

The 19th section declared that the company should be subject to all general laws which might be enacted by the Legislature of Ontario in reference to companies carrying on the business of fire and marine insurance.

The Act, which now forms chapter 160 of the Revised Statutes of Ontario, was passed on the same day as the Act incorporating the company, being 39 Vict. ch. 23, and came into force on the 1st July, 1876.

On the 7th March, 1878, the Joint Stock Companies' Winding-up Act, 41 Vict. ch. 5, was passed by the Legislature of Ontario, and by its terms, as well as by the terms of the Act of incorporation of the Union Fire Insurance Company, it applied to that company.

The company was insolvent in 1881, and in November of that year its license under chapter 160 was suspended by order in council.

It was clearly liable to proceedings under chapter 160 for distribution of the deposit in the hands of the Provincial Treasurer, and to whatever other action that statute authorized; and was also liable to be proceeded against under the Provincial Winding-up Act of 1878.

The Insolvent Act of 1875 had been extended, with modifications, to fire and marine insurance companies in 1878, by 41 Vict. ch. 21 (D.); but that Act, though never expressly repealed, ceased to be operative when the Act of 1875, and the amending acts of 1876 and 1877 were repealed in 1880 by 43 Vict. ch. 1 (D.); and the Dominion Winding-up Act, 45 Vict. ch. 23, was not passed until May, 1882.

Therefore, in November, 1881, when the action of *Clarke v. The Union Fire Insurance Co.* was instituted, the choice of statutable proceedings was between the two Provincial Acts, R. S. O. ch. 160, and the Joint Stock Companies' Winding-up Act.

Clarke's action was brought under chapter 160 to have the deposit administered, and asking other relief outside of the terms, and perhaps also beyond the scope of the statute, viz., to have the company wound up, and the assets administered under the direction of the Court.

Judgment was entered on 7th January, 1882, giving the full relief asked by the plaintiff. William Badenach, who had been appointed in November, as receiver of the estate, effects, and business of the company, and also receiver for the purposes of the chapter 160, sections 22 and 23, was continued in that office, and the master was to take accounts and make full inquiries as to debts and assets.

In the meantime other creditors had moved under the Joint Stock Companies' Winding-up Act, and had, on the 23rd of December, 1881, obtained a winding-up order from the County Court; but they dropped their proceed-

ings, which were formally stayed by an order of the Chancellor on 29th November, 1882, the petitioners being added as parties defendant in Clarke's action to represent themselves and the other shareholders who were prosecuting the winding-up order.

Then the receiver and the Master in Ordinary having made reports, we have, under the date of the 30th of April, 1884, a judgment on further directions, under which the master is (amongst other things) to settle who are the stockholders, and the amounts unpaid on their stock, and to realise the outstanding assets other than the amounts unpaid on stock, and, after confirmation of the master's report, the company is to make calls for enough to pay its debts.

Thereupon the master issued a warrant appointing the 17th of June, 1884, for settling the list of shareholders, and on that day Shoolbred, the present appellant, appeared and submitted a number of objections, including objections to the jurisdiction, which latter objections we are told the master did not consider himself at liberty to entertain.

The investigation respecting the shareholders seems to have been difficult, and it is said that the suggestion came from the master that it could be better managed under a winding-up order.

Therefore a petition was presented by two of the creditors, and the order of 27th January, 1885, was made.

The Dominion Act of 1882, 45 Vict. ch. 23, declares, in section 13, that whenever a company becomes insolvent, a creditor for the sum of \$200 may, after four days' notice of the application to the company, apply by petition for an order that the business of the company be wound up. "Such order," it declares, "is hereinafter called a 'Winding-up order.'"

Then, by section 14, the Court may make the order applied for; may dismiss the petition with or without costs; may adjourn the hearing, conditionally or unconditionally; or make any *interim* or other order that it deems just.

Sections 9 and 10 define insolvency ; and it is clear that, so far as the regularity of the order depends on the terms of sections 13 and 14, it is unimpeachable.

But it is argued that the effect of section 24 is to forbid the making of a winding up order unless in the order a liquidator is appointed, after previous notice to the creditors, contributories, shareholders, and members of the company.

The section was amended in 1884 by the Act 47 Vict. ch 39, by prefixing to it the words, "The Court in making." As thus amended it enacts that "The Court in making the winding-up order, must appoint a liquidator, or more than one liquidator, of the estate and effects of the company ; but no such liquidators shall be appointed unless a previous notice be given to the creditors, contributories, shareholders or members in the manner and form prescribed by the Court."

Upon this two objections are raised. The greater one, which includes the less, is that there can be no winding-up order which does not contain in it the appointment of at least one liquidator, wherefore the order in question is waste paper ; and the other, or subsidiary one, is that the liquidator must be appointed by the Court itself, and not by the master, and therefore the order is to that extent bad, even if sustainable as a winding-up order against the principal objection.

The section may be somewhat loosely drawn, but to construe it so as to support the principal objection would be in my judgment to attribute to this part of the statute a greater want of precision than can be fairly charged against it.

We should have in the first place a manifest inconsistency with section 13, which authorizes the order to be made on notice to the company only, and also with section 14, which contemplates and authorizes the making of the winding-up order promptly when the company does not oppose it. The provisions of sections 15 and 16 for making inquiries respecting the affairs of the com-

prejudice from any unavoidable delay in making inquiries or giving notices.

It is worth while to note particularly that the notice required by section 24 is notice of the intention to appoint a liquidator, not notice that a winding-up order is to be applied for. The only notice prescribed for that proceeding is the four days' notice to the company under section 13. It may therefore be questionable whether it is contemplated by the statute that a creditor or contributory attending on a notice under section 24 shall be heard to object to a winding-up order being made, even if that proceeding stood by adjournment for the same day. He certainly could not appeal to the language of the statute in support of such a claim; and as far as the practical purpose of the statute can be gathered from its language—having regard particularly to the limitation of the notice to the question of the liquidator, and to the form of section 30, which I have already spoken of—no reason appears for insisting on the appointment forming part of the winding-up order. It should also be borne in mind that the notice to the company required by section 13 is notice to the directors or others who represent the joint interests of the members of the corporate body, and may reasonably be taken to be, as the Legislature in section 13 treats it, as sufficient notice of the application for the winding-up order, while, when the separate interests of individuals or classes are involved, as they may be in the choice of a liquidator, notice of a different kind, such as that required by section 24, becomes necessary.

For these reasons I am against the appellant upon what I have called the principal objection, without laying any stress upon the circumstance that the order in question in fact provides for the appointment of a permanent liquidator, though the choice of the individual is referred to the master.

This reference to the master is the subject of the second or subsidiary objection. I do not think that objection well founded. It is, in my view, met by seve-

ral provisions of the statute itself, particularly by section 77, which declares that the powers conferred on the Court may be exercised by a single Judge in Chambers, and, in this Province subject to appeal to a Judge according to the ordinary practice, by the master, referee or other officer who, under the practice or procedure of the Court, presides in Chambers, or (under the amendment of 1884) by the Master in Ordinary, or by any local master or referee; and also by section 98, which declares that until forms, rules, and regulations, to be followed and observed in proceedings under the Act have been made by the Judges, the various forms and procedures, including the tariffs of costs, fees and charges, in cases under the Act, unless otherwise specially provided, are, as nearly as may be, to be the same as those of the Court in other cases.

These provisions do not reach the point so much by their literal and direct effect as by the indication that the statute is intended to be worked by the ordinary machinery, and in the ordinary course of procedure in the courts.

I agree with the learned Judge whose judgment we are considering, in the opinion expressed by him that the direction that the Court shall appoint a liquidator means no more than that the Court shall make the appointment by means of its ordinary machinery. In a statute passed for Ontario alone there would be no difficulty in holding that, in the absence of some indication that the full Court was intended, the duty assigned to the Court would be well performed by a Judge in Chambers. *Smeeton v. Collier*, 1 Ex. 457, is an authority for that proposition.

In this statute, which applies to all the Provinces in the Dominion, the Legislature prudently avoided uncertainty on the point by expressly declaring in section 77 that the powers conferred on the court may be exercised by a single Judge, and in Chambers, thus stating what with us would be the ordinary rule, with one qualification by giving an appeal to this Court in some cases, and not to the Court whose function the Judge discharges.

But with us certain functions of the Court were discharged by other officers, and the Legislature excluded the implication that these officers were powerless in winding up proceedings, which might have followed from the express declaration of the power of the Judge in Chambers, by adding the second part of section 77, the language of which deserves, in my opinion, careful attention. As it stood in the original Act of 1882, it was that "In the Province of Ontario such powers may, subject to an appeal to a Judge according to the ordinary practice, be exercised by the master, referee or other officer who, under the practice or procedure of the Court, presides in Chambers." I think it is only by a misconception of the force of this language that an intention is perceived to confer upon the officers named any jurisdiction which did not belong to them under the ordinary practice and procedure of the Court. They only presided in chambers for the purpose of discharging such duties as were lawfully assigned to them. If they stepped outside of those limits their action was simply void, as was held by the late Chancellor in *Queen v. Smith*, 7 P. R. 429.

Presiding in Chambers does not here mean occupying a seat in a particular part of a particular room, but discharging those functions of a Judge in Chambers which the officer is lawfully empowered to discharge. Within the scope of that authority section 77 declared that the officers were to have power in winding-up proceedings, subject as in ordinary cases to an appeal to a Judge.

But this express saving of the ordinary mode of proceeding in Chambers tended towards the implication that other officers were excluded by whom part of the functions of the Court were discharged, but who did not preside in Chambers, and that implication was removed in 1894 by the addition of the words "or by the master in ordinary or by any local master or referee."

Another significant alteration in the amended section is the omission of the words "to a Judge," making the phrase now read "subject to an appeal according to the ordinary

practice of the Court," which is wide enough to cover an appeal from the master's report to the Court, and leaves the ordinary procedure of the Court to apply.

I see no reason for holding that any new jurisdiction is intended to be conferred on the master in ordinary or the local masters. On the contrary, I take the object to be to make it clear that they as well as the other officers who have judicial functions, are to exercise them in winding-up proceedings under the statute to the same extent as in ordinary actions.

Two cases were cited to us from 10 P. R. at pp. 415 and 485, in which a view was expressed of the effect of section 77 somewhat differing from that which I have taken. I do not question the correctness of the decisions in those cases, which was that the power of the master in chambers does not extend to ordering a reference to the master in ordinary under the Winding-up Act. The same thing had been held with respect to the power of the referee in other actions in the two cases cited by the learned Chancellor at p. 487, of *Brown v. Dollard*, 6 P. R. 113, and *Queen v. Smith*, 7 P. R. 429. But I am not convinced either by the reading of the statute or by any considerations of convenience or necessity, that proceedings in winding-up cases are intended to be on any different footing from those in other actions.

My conclusion so far, is that the winding-up order was proper, including the reference to the Master in Ordinary to nominate the liquidator, in doing which the master will of course have regard to the statutory requirements respecting notices, &c.

The questions raised concerning that part of the order which adopts the proceedings in *Clarke's Case*, must, I think, be solved by considering the effect of the second section of the Act of 1884, which I have purposely abstained from noticing earlier, although it bears also on the question of the validity of the winding-up order.

The enactment is that when at the date of the Act of 1882 "a company was in liquidation or in process of being

wound up, any shareholder, creditor, assignee, receiver or liquidator of such company may apply by petition to the court asking that the company be brought within and under the provisions of the said Act, and the Court may make such order; and the winding-up of such company shall thereafter be carried on under the said Act, and the expression 'winding-up order' in the said Act shall include the order in this section mentioned."

It may not be unimportant to notice the change of phraseology in this new section which speaks of winding-up the company, while the original Act, following the English Companies' Act, everywhere uses the phrase *winding up the business of the company*. The change has evidently been made by inadvertence and without any intention to convey a different meaning, and we must read the new section as dealing with companies which, on the 17th of May, 1882, were in liquidation, or whose business was at that date, in process of being wound up. Does this company answer that description? In my opinion it does answer it. We cannot make the clause support the theory that the liquidation or winding up must be in progress under some Dominion statute, or under some other statute, or by some particular proceeding in or out of Court, without adding to the words which the Legislature has employed; and I see no warrant for entering on any such speculation.

There was, just before 1882, no Dominion law in force for winding up the business of companies.

The Insolvent Act had been out of existence for four years before 1884, except for the purpose of cases pending when it was repealed, and the conjecture that the amendment was made to provide for cases already sufficiently provided for, if any such cases still lingered on, has not the merit of plausibility, even if we leave out of view the certainty that such cases would have been described in more appropriate terms.

The clause points simply to the fact—Was the company in fact in liquidation, or was its business in fact in process of being wound up? If so, the statutory declaration is

that what was being done without the aid of such an Act as this may be taken up and continued under the Act.

After writing what I have just read I looked at the official reports of the debates on the Acts of 1882 and 1884 in the Senate and House of Commons at Ottawa. I do not find anything in what was said in either house to cause me to doubt the correctness of the views I have taken of the statutes. The 77th section is not anywhere referred to; but, on the point last discussed, I find that Sir John A. Macdonald is reported, in moving the second reading of the Act of 1884, in the House of Commons, to have explained that the words "either under a general Act or a special Act," which occurred in the first section of the Act of 1882, were omitted in the amending Act to give the section a larger scope, and especially to cover the case of a company being wound up in any manner, such as by order of the Court of Chancery; and that in sections 2 and 3, where the original Act applied to companies which at the time of the passing of that Act were insolvent, or in process of being wound up, no procedure had been provided whereby effect could be given to that provision, and that in the amending act it was intended to provide for the omission.

This confirms the view I have taken.

I have not placed any stress, in what I have said, upon the effect of the clause now in discussion, in warranting the making of the winding-up order, though I might well have done so, because the business of the company was in fact being wound up by order of the High Court; and, moreover, the order under the Ontario Joint Stock Companies' Winding-up Act was in force at the specified date, viz., on the 17th of May, 1882; and the clause affords an answer, in addition to that which I have attempted to give, to the contention that some other notice should have been given before the order was made.

Confining ourselves now to the action of Clarke in which the business of the company was being wound up, we have the statutory direction that the winding up is to

be "thereafter," that is after the order, carried on under the Act—not begun *de novo*, but taken up and continued. Therefore the parts of the order now in discussion are merely declaratory of the effect of the Act, and are not open to the objections made in this appeal.

For these reasons I think the appeal should be dismissed, with costs, without reference to the question raised as to the right to appeal. On that question I prefer to give no decided opinion, though my inclination is against the objection.

OSLER, J.A.—The only question involved in this appeal is, the regularity of the winding-up order, for that this company was insolvent in 1881 when Clarke commenced proceedings against it: that it has so continued to the present time, and has for years been liable to be wound up, and that it ought to be wound up as expeditiously as possible is apparent on the face of the proceedings before us, and is not contested by the appellant.

I have had an opportunity of reading the opinion prepared by Mr. Justice Patterson in which the proceedings which have hitherto taken place in the course of this litigation, and the legislation bearing on the question at issue are so fully and clearly detailed that I shall not refer to them further than is necessary to explain my own conclusion.

I agree in the first place that this company was, at the date of the Winding-up Act of 1882, "a company in liquidation or in process of being wound up" within the meaning of section 2 of the Act of 1884. If the intention of the Legislature had been to confine the operation of that section to proceedings which had been commenced four years previously under the Insolvent Act and its amendments they would naturally have indicated it by referring to that Act. The contention of the appellants requires us to introduce words not found in the section, but I see no sound reason for not giving the words which are there, and which I have already quoted, their obvious and natural

meaning, viz., a company which has ceased to do business is declared or admitted to be insolvent, and the assets of which are being got in and administered for the payment of its debts.

That, I think, was the position in which this company was placed by their resolution passed on the 24th November, 1881, and by the proceedings and judgments in Clarke's action.

Whether the company could have been effectually and fully wound up, and their assets completely administered in that suit, or whether the shareholders could have successfully resisted any proceedings taken by the directors in making and levying calls in compliance with the judgment is unnecessary for us to determine. It is sufficient to say that it was a proceeding in which, by the consent of the company, its assets were being got in under the judgment of the Court, and administered for the benefit of all its creditors.

Therefore, in my opinion, the case was one for making a winding-up order under the 2nd and 3rd sections of the Act of 1884, rather than under the 13th and 24th sections of the Act of 1882, although, of course, one might quite properly have been made under the latter.

Then the question is, whether the order is defective because of the manner in which the appointment of a liquidator has been provided for therein?

The contention is (1), that whether the winding-up order is made under the Act of 1882 or under that of 1884, it is imperatively required that the liquidator shall be appointed in and by the order itself; but (2) that even if the liquidator need not be appointed in the order, the Judge making the order cannot delegate or refer the appointment to the master.

The more I have considered the first objection, the more impressed I am with the difficulty of surmounting it. But I think that the proper answer to the other, which arises only if the former fails, is that which it received in the Court below—namely, that if the true meaning of the

Act is, that as incidental to the making of the winding up order, though not necessarily in the order itself, the Court must appoint a liquidator, then it may make such appointment by means of its ordinary machinery, and through its judicial officers. The case of *The Agriculturist Cattle Ins. Co.*, 3 D. F. & J., 194, in which it was held that the Judge could not delegate the making of a similar appointment to his clerk, though much relied on, seems to me inapplicable, or rather, indeed, by implication to be an authority in support of this order, for the objection there was that the Master of the Rolls had acted erroneously in treating his chief clerk, who was not a judicial officer, as having the authority of a Master in Chancery, whose powers, in England, had been taken away and vested in the Judges by the Master's Abolition Act, 16 Vict. ch. 80.

To return to the first objection: the difficulty is one that could not have arisen under the Imperial Act, the 92nd section of which enacts generally that for the purpose of conducting the proceedings in winding up a company and assisting the Court, there may be appointed a person to be called an official liquidator, and the court having jurisdiction may appoint such person to the office either provisionally or otherwise as it thinks fit. There is no limitation as to the time or manner of making the appointment, and though it may be made on the hearing of the petition where all parties consent, the settled practice—founded upon the Act, and the 7th and 8th rules of November, 1862, the latter of which empowers the Judge to appoint an official liquidator without notice or advertisement, or to fix a time and place for his appointment—is to direct a reference into Chambers after making the winding-up order. *Re General Financial Bank*, 20 Ch. D. 276.

Sections 85 and 86 are in harmony with sec. 92. The latter part of sec. 85 enables the Court at any time after the presentation of the petition and before the first appointment of a liquidator to appoint a provisional liquidator of the estate; and as there is nothing which

makes it necessary to appoint the liquidator in the winding-up order there is nothing to prevent the appointment of a provisional liquidator, even after the winding-up order, before the first appointment of the liquidators.

So, under section 86, which enables the Court upon hearing the petition, to dismiss or to adjourn the hearing, and to make any interim or other order it deems just, the winding up order may be made on the return of the petition, and a reference directed for the appointment of a liquidator.

Provision is made by the rules for giving notice of presentation of the winding-up petition by advertisement in the *Gazette*, and (in certain cases) by service on the company, so that contributories and creditors as well as the company may have an opportunity of shewing cause against the application.

If we now turn to the Canadian Act of 1882, we find by section 13 that the application for the order may be made after four days' notice to the company, and that under section 14, which corresponds generally with section 86 of the Imperial Act, the Court, if there was no controlling provision, might probably make the order without notice to any one but the company on the first presentation of the petition.

Then comes section 24, the language of which has given rise to this appeal:

The Court, in making the order, *must* appoint a liquidator, or more than one, but no *such* liquidator shall be appointed unless a previous notice be given to the creditors contributories in the manner and form prescribed by the court.

Standing by itself that section is very plainly expressed, but it is said not to run on all fours with sections 13 and 14, which seem to contemplate the possibility of an order being made on notice to the company only, and immediately on the presentation of the petition after the required delay. But if those sections are read as being controlled by section 24, there is, I think, no real diffi-

culty, and no violence is done to the language of any of them. Nothing is said as to the order being made on the presentation of the petition. The language of section 14 is, "the Court may make the order applied for." If sufficient time has not elapsed from the date of service of notice of its presentation (at which date the Court becomes seized of the case, see sec. 12, and *Emmerson's Case*, L. R. 12 Eq. 231) to enable contributories and others to be notified of the intended appointment of a liquidator, the petition may be retained and the hearing adjourned, and in the meantime, in case of urgency, a provisional liquidator may be appointed, as provided by section 30.

I think we should attribute to the clear and explicit words of section 24, their natural and ordinary meaning; in doing so we do no violence to any other section of the Act, but on the contrary make the Act speak the intention of the Legislature, (*Great Western R. W. Co. v. Rous*, L. R. 4 H. L. 650, per Westbury, C.,) that contributories, &c., shall in effect have notice of the application for the winding up order, at least where the proceedings are originated under the Act of 1882. I cannot read the direction, "the Court in making the winding-up order, must appoint a liquidator," as meaning anything else than that he must be appointed in the winding-up order. Such liquidator is the liquidator of the estate, not the provisional liquidator. The former must be appointed after notice to contributories, while the appointment of the latter, as provided by section 30, though it may be made at any time after the presentation of the petition, yet cannot be made after the first appointment of a liquidator. Of this appointment, *i. e.*, the provisional one, no previous notice is required, unless indeed it can be held that it may be made in the winding up order, in which case it would follow that notice must be given of it also, since by the express terms of section 24, no *such* liquidator—that is, no liquidator appointed by the order, shall be appointed unless previous notice is given. As I have said, however, I think that section has no reference to the provisional

liquidator, the necessity for whose appointment can only exist before the winding-up order is made, and to require notice of which to be given might wholly defeat its purpose.

The order in question, therefore cannot, I fear, be supported under the Act of 1882, because in making it the liquidator of the estate was not appointed, or if the provisional appointment, might have been sufficient, it was made without the notice, which in that case, I must hold that section 24 requires.

Can it then be supported under the Act of 1884? I do not think so. By section (2) of that Act, the Court may make such an order as was applied for in this case, and it is declared to be a winding-up order within the meaning of that expression in the Act of 1882.

Section 3 enacts that in *making* the order the Court may direct that the assignee, receiver or liquidator, if one has already been appointed in the pending proceedings, shall be the liquidator under the Act, *i. e.* the Act of 1882, or may appoint some other person to be liquidator.

Under this section, also, it is the liquidator of the company who is to be appointed. Nothing is said as to the appointment of an *interim* or provisional liquidator, because, no doubt, in such a case there can be no necessity for it, there being already a person who fills that, or an analogous position. Therefore the Court may do one of two things—may appoint the existing receiver, liquidator, &c., to be the liquidator of the company, or may appoint some one else to be such. But, as in the case of an order under the Act of 1882, so in the case of one under this section (3) the liquidator is, by its very terms, to be appointed in making the order itself. Therefore, such appointment cannot be delegated in either case, but must be made by the Judge or officer who makes the order.

With regard to the powers conferred upon the officers mentioned in the amended section 77 of the Act of 1882, the Legislature have expressed themselves very unhappily if they did not intend to confer upon each of them as to

FOX V. SYMINGTON ET AL.

Interpleader—Claims for damages between parties—Division Courts' Amendment Act, 48 Vict. ch. 14, sec. 6, sub-sec. 3, and sec. 7, sub-sec. 2, (O.)

On an interpleader proceeding in the Division Court under 48 Vict. ch. 14, sec. 6, sub-sec. 3, (O.), in respect of a claim to goods taken in execution, any claims between the parties themselves for damages arising out of the execution of the process, must also be brought before and adjudicated upon by the Judge who hears the interpleader summons. Whether such claims are then brought forward or not the adjudication upon the summons is final and conclusive between the parties, and no action can afterwards be maintained in respect of them.

In such an action the fact of the previous adjudication may be properly pleaded as a defence.

Quære, whether the proceedings therein can be summarily stayed on motion.

Quære, Whether an appeal lies under ch. 14, sec. 7, sub-sec. 2, from the adjudication of the Judge of the Division Court on a claim for damages.

AN appeal by the defendants from the judgment of Wilson, C. J., reported 9 O. R. 767, where the facts are clearly stated, and came on to be heard before this Court on the 25th of May, 1886.*

Holman, for the appellants. The third and sixth paragraphs of the statement of defence, which are the portions of the defence demurred to, shew, it is contended, with sufficient distinctness that any and every claim which either party has against the other, for, or in respect of any damages arising, or likely to arise, out, or by reason of the execution by the bailiff of any process, is to be adjudicated on by the Judge who tries the interpleader issue, and such adjudication is final and conclusive between the parties; and the plaintiff cannot now raise up a claim against the respondent, arising out of such seizure. If the plaintiff had any real grounds for asserting any claim for damages, he should have made such claim in the proceedings before the Judge in the interpleader issue: having failed to do so, the judgment then pronounced estops him from now making any such claim.

Falconbridge, Q. C., for the respondent. The facts set forth in those portions of the statement of defence which have been demurred to, do not constitute a good defence to this action; and the only proper mode of bringing that question before the Court, was by demurrer, and which it

**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

is submitted, has been properly disposed of by the judgment appealed from.

The provisions of the statute referred to in the defence, apply only to any claim for damages as asserted by the claimant or execution creditor on the one side, and the bailiff or other officer on the other—not to any claim for damages as between the contesting parties themselves; and it is not anywhere alleged on the part of the defendants that the damages sued for in the present action, have ever been adjudicated on by the Judge; and even if that were alleged or shewn it is not, according to the authorities, final as against the respondent.

In addition to the cases mentioned in the judgment, *Tinkler v. Helder*, 4 Ex. 187, was referred to.

June 30, 1886. OSLER, J. A.—This is an appeal from the judgment of the Chief Justice of the Queen's Bench Division, in favor of the plaintiff, allowing a demurrer to certain paragraphs of the defence.

We may assume from what took place before us on the argument, though it is not stated in the pleadings, that the judgment in the Division Court on the trial of the interpleader summons established the plaintiff's title to the goods seized under the defendant's warrant of attachment against Stanilands. The present action is brought for the purpose of recovering the damages sustained in consequence of the seizure, and the question is, whether by force of the recent amendment of the Division Court Act, (48 Vict. ch. 14, secs. 6, 7, (O.) such damages, as well as the title to the goods, must not be deemed to have been adjudicated upon at the trial of the interpleader summons, although no claim was there made in respect of them, but the right to make it was on the contrary expressly reserved.

Under the law as it stood in the Revised Statutes, ch. 47, sec. 210, it is probable that a claimant who had established his title to the goods on the trial of an interpleader summons might afterwards have maintained an action against the execution creditor for damages caused by or

arising out of the seizure, if at least he had made no claim for such damages in the interpleader proceedings, and there had been no adjudication by the Judge in respect of them. All the authorities are noticed and commented upon by the Chief Justice of this Court, in *Farrow v. Tobin*, 10 A. R. 69, a case which probably suggested the amendment to the Act, which we now have to consider.

That amendment is framed in terms similar in many respect to those of section 31 of the Imperial Act, 30 & 31 Vict. ch. 142, amending the County Court Act, 9 & 10 Vict. ch. 95, sec. 18, and the intention of our Legislature evidently was to introduce into our Division Court Act a corresponding provision.

I think that substantially this has been done.

Section 210 provides that in case a claim has been made to goods, &c., taken in execution or attachment, &c., by any person not being the party against whom the process issued, the clerk of the Court, on the application of the officer charged with the execution of the process, and whether before or after the action has been brought against such officer, may, by summons, call before the Court as well the party who issued the process, as the party making the claim; and thereupon any action which has been brought in respect of the claim, shall be stayed.

This is substantially similar to the first part of section 31 of the Imperial Act, except that in the latter, the clause relating to the stay of proceedings is in a different position and more extensive in its terms.

Sub-section 2 of our Act is not material.

Then comes sub-section 3 as now amended by 48 Vict. ch. 14, sec. 6, (O.) It provides that the Judge of the Division Court shall adjudicate upon the claim and make such order between the parties in respect thereof, and of the costs of the proceedings as to him seems fit; and shall also adjudge between such parties or either of them, and such bailiff, in respect of any damage or claim of or to damages arising or capable of arising out of the execution of such process by such bailiff, and make such order in respect

thereof, and of the costs of any proceedings as to the Judge shall seem fit, and any such order shall be enforced in like manner as an order made in any suit brought in a Division Court, and shall be final and conclusive between the parties. Here section 31 of the Imperial Act continues, "and as between them or either of them and the high bailiff;" but otherwise the clauses are almost verbally identical.

Sub-section 3 concludes with a clause enabling the Judge to grant a new trial to the execution creditor, claimant, or bailiff on proper grounds.

Sub-section 7 of the Act of 48 Victoria, enacts that under sub-section 3 of section 210 as above amended, the Judge shall have power to adjudicate and award damages "even though the amount of the damages claimed, found, or awarded, should be beyond the jurisdiction of a Division Court."

The learned Chief Justice held in the Court below that the proper construction of sub-sec 3 as amended was that it was intended only for the protection of the officer; providing for a claim for damages, as between the claimant or the execution creditor on the one hand, and the bailiff or officer on the other, and that it left untouched the right of the claimant to sue the execution creditor for damages arising out of the seizure of his goods under the warrant.

The clause is not happily expressed, and if the question had been untouched by authority I should not be prepared to say that it was not fairly capable of the meaning which has been placed upon it in the Court below.

I think the learned Chief Justice, whose judgment seems to have been delivered at the close of the argument, has some reason to complain that the authorities, including the recent case of *Farrow v. Tobin*, were not brought to his notice.

We must be guided by the decisions under the Imperial Act, of which I regard our own as substantially a transcript. The Legislature of each country had evidently the same object in view, namely, that all questions, as well

relating to the title of the property seized, as to damages arising out of the seizure under Division Court process between parties who can be brought before the Court in the interpleader summons, should be disposed of in the division court.

Death v. Harrison, L. R 6 Ex. 15, was an action of trespass for breaking and entering plaintiff's house and seizing his goods.

The 5th plea alleged that what was complained of was done under a warrant of execution issued on a judgment recovered by the defendant in the County Court: that the plaintiff having claimed the goods the bailiff caused interpleader proceedings to be taken under the Act (sect. 31 supra): that the Judge afterwards adjudicated upon the claim and declared that the plaintiff was entitled to the goods, &c., that the plaintiff had made no claim for damage arising, or capable of arising out of the seizure or sale; and that the Judge's order on the interpleader summons was valid and had not been appealed from, and was final between the plaintiff and defendant.

To this there was a demurrer, the plaintiff contending that though the claimant might have claimed for the special damage in the interpleader, yet the Act was permissive only and intended for his benefit, and did not take away his right of action if he elected not to claim there.

The Court (Martin, Channell, and Cleasby, BB.) gave judgment for the defendant. Martin, B., said:

"The case being within the words of the statute, sec. 31, says expressly the order made shall be final and conclusive. This is equivalent to saying that the whole matter between the parties shall be at an end, and I have no doubt the words were inserted with that intention. The Legislature directed this measure to meet the exigencies of common affairs notwithstanding that in some exceptional and doubtful cases a hardship may be inflicted."

Cleasby, B.: "The plea is in substance a plea of *res judicata*. It shews that though the particular claim of special damage was not in controversy, the subject matter out of which it arose, was, and that in that proceeding a claim of special damage was properly open to adjudication. If the

plaintiff had made his claim then, it could not be said that it could now be agitated again. But it is the same thing if the reason why the judge did not adjudicate it was that the plaintiff did not give particulars of his claim."

In *Hills v. Renny*, 5 Ex. D. (C. A.) 313, the action was for conversion of goods, brought by the claimants against the officers who had executed the process of the County Court, and the purchasers of the goods sold under it. On an application to stay proceedings against all the defendants, it was held that while it ought to be granted as regards the officers, the section was not wide enough to cover the case of the purchasers, and gave no authority to stay proceedings in an action against them. I refer to the case merely for the purpose of citing an observation of Brett, L. J., which shews, that although the case of *Death v. Harrison* is not noticed, its principle was approved with an expression of regret that the section had not a wider application. The learned Lord Justice says:

"We were in hopes to be able to give a wide interpretation so that all persons interested should go before the Judge of the County Court, and that their respective rights should be determined by him, but I do not see my way to this conclusion."

Unless the provisions of our Act are fairly distinguishable from those of the English Act upon this point, I think the plaintiff is concluded by these decisions. Our Act declares that the order of the Judge "shall be final and conclusive between the parties." Those are the words to which effect was given in *Death v. Harrison*, which like this was an action between claimant and execution creditor. I do not consider that the omission from our Act of the words which follow those in the English Act, "and as between them or either of them and the high bailiff," affects the construction to be placed on the clause; in such an action as this, though it might give rise to an argument if the action was by one of the parties against the bailiff.

Then it is said that the Legislature cannot have intended to leave the large questions which are sometimes involved in

such cases, between the parties themselves, other than the bailiff, to be disposed of by the Judge of the Division Court, no appeal being given from his decision, as there was by the English Act. The answer to this is, that it is evidently intended by sub-section 2 of section 7 of ch. 14, to give the right of appeal. Whether the intention of the Legislature has been expressed effectually is another question. It is curious that no reference is there made to the Act passed in the previous year, (1884) which gives an appeal in interpleader proceedings in a Division Court.

The fact that by section 7, sub-section 1, the Judge has power to adjudicate upon and award damages "beyond the (ordinary) jurisdiction of a Division Court," indicates very strongly that the section was primarily intended to have a wider application than merely to the claims of the respective parties against the bailiff.

Mr. Falconbridge urged that if the Judge had jurisdiction under the amended sections to deal with the damages, the proper mode in which to obtain relief was by an application to stay proceedings.

In *Death v. Harrison*, however, the defence was raised by plea without objection, and here it is in effect set up as a defence arising after the commencement of the action.

I think it is not clear that it can be raised in any other way, as that part of section 210 which empowers the Court to stay proceedings in an action brought in respect of the claim has not been amended, as in the English Act, so as expressly to embrace actions brought in respect of "damage arising out of the execution of the process."

In my opinion, with great respect, the appeal should be allowed.

HAGARTY, C. J. O., BURTON, and PATTERSON, JJ. A., concurred.

Appeal allowed, with costs.

THAMES NAVIGATION COMPANY (LIMITED) V. REID ET. AL.

*Incorporated company—Provisional delivery—Personal liability—
Sale and purchase.*

The plaintiffs were the owners of certain boats, docks, &c., and being desirous of giving up their business proposed to sell all their rights in their charter, boats, &c., to a company to be thereafter incorporated as the "Thames River Navigation Company." The proposal was assented to by the defendants and others subscribing to the stock of the new company, and the purchase money was to be paid out of the funds of the latter when formed. Upon this understanding the vessels were delivered to the defendants on behalf of all parties, and the sum of \$3,500 on account of such purchase was paid out of the money paid in by persons subscribing for shares in the new company. Before the completion of repairs necessary to render the boats serviceable, one of them was destroyed by an unexpected flood, in consequence of which, proceedings for the incorporation of the new company were abandoned.

Held, [reversing the judgment of the Court below] that the defendants were not liable for the balance of the purchase money, as the circumstances shewed there had never been a completed sale and purchase. The only contract proved, was a provisional one to take effect upon the incorporation of the new company, and the delivery which had taken place, was not in pursuance of a contract of sale, but simply to enable the repairs upon the vessels to be effected.

THIS was an appeal from the judgment of Cameron, C. J., reported 9 O. R. 754, where and in the present judgments the facts fully appear; and came on to be heard before this Court on the 20th of May, 1886.*

W.R. Meredith, Q.C., and *W.D. Fraser*, for the appellants. The evidence at the trial proved conclusively that there was no intention on the part either of the shareholders of the plaintiff company or of the appellants that they or either of them should become personally liable for the price of the steamers, furniture, &c.; the understanding was that the shareholders should look to the proposed new company or the funds subscribed by the shareholders or intended shareholders therein, for such price. Under these circumstances therefore the appellants will not be held liable for the purchase money; and the agreement or con-

**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OWLER, JJ.A.

tract if any, was with the shareholders of the plaintiff company, not with the plaintiffs.

The evidence also shews that the possession of the steamers was given by the proposed vendors, not in pursuance of any contract of purchase, but with the view of having them put in proper repair pending the incorporation of the company, and no agreement to pay for them can therefore be inferred from such possession having been given or accepted.

It also appears that the leading shareholders amongst the proposed vendors were the promoters of the proposed company and subscribed for shares therein, and were some of those who directed the performance by the defendants of the acts alleged to have been done by them by reason of which it is claimed that the defendants are liable to pay for the boats and their furniture. In a word, we contend that the defendants were in reality the agents of the plaintiffs as well as of the shareholders of their company to do such acts, and are entitled to be indemnified by them against all liability by reason thereof. The defendants we contend cannot be rendered liable for the conversion of the steamers: such qualified possession of them as the defendants had was with the consent of the plaintiffs, and the loss of one in the manner described by the witnesses cannot render the defendants liable for its loss.

The case of *Duncan v. Tindall*, 13 C. B. 258 clearly establishes that the plaintiffs are not entitled to recover for the price of these boats as they are shewn to have been registered British vessels, and there was no bill of sale or contract in writing for the sale of them containing as required by the statute a recital of the certificate of the boats, and the alleged contract of sale, if any such there were, is therefore void.

In addition to the objections already pointed out, the evidence establishes that there was a secret agreement between the plaintiffs and the defendant Brunton, by which a large part of the price to be paid was to

be received by him. Now it is clear that the plaintiffs, the shareholders of the plaintiff company, and the defendant Brunton occupied such a position towards the appellants and the proposed new company, that it was their duty to have communicated that agreement to the defendants and to that company. They did not do so however, on the contrary they concealed it from them, and such proposed new company would by reason thereof have been entitled, if formed, to have rescinded, and the defendants are now entitled to rescind, the alleged agreement for purchase even if the same were otherwise binding on them.

The plaintiffs' remedy, if any, is not by action against these appellants for the recovery of the alleged price. If they are entitled to any relief, all parties interested, namely, those who would be liable to contribute, must be brought before the Court and the rights and liabilities of all ascertained and adjudicated upon. Under any circumstances there was no evidence upon which the defendants in the action could be held jointly liable, and therefore the judgment should have been for the defendants.

Gibbons, for Brunton a defendant.

Osler, Q.C., and *Flock*, for the respondents, contended that they were entitled to recover the balance unpaid on the price of the boats from the defendants; that there was no fraud on the part of the vendors; at all events there was no fraud chargeable to the plaintiffs; and it having been established in evidence that the appellants had collected from the alleged shareholders in the proposed new company \$6,100 of which in any view of the case there was \$2,545.83 with which the defendants were chargeable and which was therefore applicable to the payment of the claim of the respondents, they were entitled to retain their judgment for that sum.

Ex parte Williams, L. R. 2 Eq. 216; *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Parker v. McKenna*, L. R. 10 Ch. 96; *Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha and Telegraph Works Co.*,

L. R. 10 Ch. 515; *Re Hereford and South Wales Wagon and Engineering Co.*, 2 Ch. D. 621; *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73; *Bagnall v. Carlton*, 6 Ch. D. 371; *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 386; *Holmes v. Higgins*, 1 B. & C. 74; *Malburn v. Codd*, 7 B. & C. 419; *Goddard v. Hodges*, 3 Tyr. 209, 1 Cr. & M. 33; *Wilson v. Curzon*, 15 M. & W. 432, were, with other cases, referred to.

June 30, 1886. BURTON, J. A.—The plaintiffs, in their statement of claim, allege that they entered into a contract with the defendants, under the name of The Thames River Navigation Company, to sell to them two steamers and their furniture and appliances for \$12,000.

They further allege that in part performance of the same they delivered to the defendants actual possession of the steamers, and the defendants paid \$3,000 on account.

They allege that whilst in their possession they were destroyed by a flood; and they base their claim to recover upon two grounds: 1st. To be paid the balance of the consideration as an actual purchaser; and, if necessary, a judgment for specific performance, or 2ndly in the event of its being found that there was no actual contract for sale, then that the defendants should be held liable for a wrongful conversion.

The defendants, in substance, allege that the contract was not with them, but that by a mutual arrangement between the shareholders in the old company and the defendants and others it was proposed to form a new company, who should obtain a charter of incorporation; and that upon the company being formed the sale should be carried out; and that in the meantime the subscribers should pay over the moneys in respect of their subscriptions into the hands of certain parties named; and that it was part of that arrangement that the vessels should be taken in charge by the defendants on behalf of all parties interested, with a view to their being put into a proper state of repair so as to enable them to be run by the pro-

posed company; and that whilst they were so in their possession, without any fault on their part, one of them was carried down the river and lost in a freshet, which prevented the further prosecution of the scheme of incorporation.

The case was tried before the Chief Justice of the Common Pleas Division, and some other questions besides those I have referred to were discussed at the trial, which in the view I take of the case are not material, but the learned Judge held that the defendants although not intending to incur any liability beyond the amount of the calls upon their shares, were liable for the purchase of the vessels, having taken possession and paid part of the price, and there being no one else responsible to the plaintiffs.

There is no doubt of the general principle that a person contracting on behalf of a company not yet formed is liable on that contract, but in such a case the contract can be so worded as to exclude any personal liability, and it is always open to inquiry when the contract is not in writing, whether it was not understood by all parties that there was not to be any personal liability.

In ordinary cases if one does work on the order of another under such circumstances that it must be presumed that he looks to be paid as a matter of right by him, then a contract would be implied with that person, and in the same way, if a person assumes to act for a body not then in existence, or for a principal whom he is not competent to bind he becomes personally liable, and so also in the ordinary case of goods furnished, but as I before remarked it is always open to inquire whether the plaintiffs and defendants intended to contract on the footing of a personal liability.

What then are the facts in evidence in reference to the contract in the present case?

The plaintiff company consisted of Dr. Woodruff and five others, and he and three of his fellow shareholders took an active part in the promotion of the new company, and subscribed for \$4,000 of the stock.

The stock book in this new company contains an agreement for the subscription of shares, which was prepared by Dr. Woodruff, and is prefaced by a recital in these terms :

"Whereas, it is proposed to start a joint stock company, under the Canada Joint Stock Company's Act, to be called The Thames River Navigation Company (Limited), to purchase from The Thames Navigation Company (Limited) all their boats and personal property, and all their interest in docks and improvements, and all their property of every sort and goodwill of their business, for the sum of twelve thousand dollars, free from all incumbrances, debts and liabilities of the said Thames Navigation Company (Limited), the capital of such proposed company to be twelve thousand dollars, divided into two hundred and forty shares of fifty dollars each."

And at a meeting of the subscribers held on the 27th March, 1883, at which Dr. Woodruff the president of the plaintiff company was present, a resolution was passed in these words :

"That the offer of The Thames Navigation Company (Limited) to sell to this company their assets and goodwill for the sum of \$12,000.00, be and the same is hereby accepted and approved, and the directors instructed to carry into effect the same as soon as possible.—Carried."

Followed by this :

"That the directors be hereby authorized to take such steps towards putting in proper repair the boats and property to be acquired by the company, pending the incorporation of the company, as they shall deem proper.—Carried."

At the same meeting persons to act as directors were named, who were instructed to apply for a charter, and trustees named to receive one moiety of the sums payable on the shares subscribed which was declared to be payable in cash.

This, Dr. Woodruff admits, is the only agreement upon which the plaintiffs rely, and on the following day after the meeting the boats were, without any formal meeting or resolution of the plaintiff company, handed over by Dr. Woodruff to Mr. Reid in the terms of the resolution, and with the object of carrying out the object of that resolu-

tion. Dr. Woodruff candidly admits upon an examination, that it never entered into his head that the members of the board were personally buying the boats or becoming personally liable to purchase, but on the contrary, that the money upon the stock subscribed would be collected and paid over.

Here then we have a sale to a proposed company not to any individuals who assumed to contract for a company to be incorporated, but both parties, vendors and the shareholders in the proposed company, with full knowledge of all the facts, agreed that a charter should be applied for and the sale then carried out, certain parties being authorized in the interval to take steps for putting them in repair pending the incorporation of the company, the property being referred to as "property to be acquired by the company" so to be incorporated.

It seems to me it would be an entire misconstruction of the intention of all parties to treat the delivery of the boats to Mr. Reid as a delivery in part performance of the contract, or that any such delivery was intended until the company was fully incorporated and the money paid. It was a mere permission for the convenience and in the interest of all concerned to go on with the necessary repairs.

Nor does the payment under the circumstances set forth in the evidence create any liability in these defendants; all that was authorised at the meeting was a call upon the subscribers of fifty per cent. of their subscriptions to be paid to certain persons, and by them to be paid into the bank; no one was authorised to pay that money out, but without authority \$3556.17 was paid out to Dr. Woodruff on account of the purchase.

This was not known to the shareholders until the meeting held immediately after the loss, but it is urged that when the subscribers present at that meeting with the knowledge of what had been done in the way of taking possession and paying money on account failed to repudiate it, they rendered themselves liable, but a moment's con-

sideration will show the utter fallacy of such a contention; these persons were not partners or agents of each other, but merely in the position of persons intending to become partners after the company was formed; if Reid under these circumstances had professed to act as agent of the proposed company, and had accepted an unconditional delivery of the steamers, still professing to act for them, and had paid money on account, that might or might not render him personally liable, but how could the persons attending that meeting incur any responsibility by what occurred there. On the contrary, everything which then took place is consistent with its being an intended sale to the proposed company. Complaint was then made of the payment made before incorporation, and very naturally so, as every subscriber not actually assenting to the payment was entitled upon the proposed incorporation proving abortive to a return of his subscription, and all parties still treating it as a contract of sale to the proposed company concurred in a resolution to collect the balance on the stock, dispose of the assets and pay the debts.

Had this resolution been carried out by selling the vessels the parties taking part in it would, no doubt, have been liable to the plaintiffs, but it amounted to nothing more than an intention on the part of those who concurred in it to pay up their subscriptions in good faith and give the proceeds to the plaintiffs.

I see nothing here to create a liability on the part of the defendants. The contract was a provisional contract to take effect upon the incorporation of the company, and is, in my opinion, outside the cases where promoters have professed to act for a company and been unable, by reason of the undertaking proving abortive, to make good the contract entered into on behalf of the intended principals.

It is said, in the reasons against the appeal, that the defendants have collected from the subscribers to the fund moneys in excess of the sum paid to the plaintiffs, and that they are liable to that extent at all events; but that was not the contract alleged or proved. The funds to which

the plaintiffs were entitled to look were not the moneys paid in and deposited in the bank, but the funds of the company when formed.

I have assumed throughout that the contract, if any, was with the plaintiff company. If it was not, but was with certain shareholders in that company, there would be an insuperable obstacle to their recovering against their co-promoters.

I agree with the learned Judge below that there is no pretence for holding the defendants liable for a conversion. Nor, in the view I take of the matter, is it necessary to deal with the cross-appeal.

I am of opinion that the appeal should be allowed, the judgment set aside, and judgment entered for the defendants.

HAGARTY, C. J. O.—I agree with the judgment just delivered. I think there was never any existing contract of sale. Assuming that there was a vendor in the shape of the plaintiff company, I do not see that there ever was a vendee.

It may be put thus: the shareholders in the plaintiff company join certain other persons in attempting to form a new company, which when formed will purchase the property in question. They hold meetings and pass resolutions all pointing to the proposed formation. The season is advancing and all parties seem to desire to have the boats fitted out. At a meeting of the subscribers to the projected company including the principal actor in the matter, Dr. Woodruff, they resolved that the directors take steps towards putting in proper repair the boats to be acquired by the company, pending its incorporation; this is done and they commence repairs, Woodruff giving defendant Reid the keys, &c.

Reid pays over to Woodruff a large portion of the moneys paid in by the subscribers.

Then comes the loss of one of the two boats, and the projected company appears to collapse—it never, at all events, has been formed.

I am unable to see that there ever was an existing vendee. It is beyond question that no one on either side ever thought that any one subscribing to the projected company assumed any personal liability as to any of this property, and there was not, I think, anything in the execution of these repairs, &c., amounting to the creation of any personal liability. The whole thing, in my mind, presents the appearance of an abortive attempt by the shareholders of the plaintiff company in conjunction with certain other persons who were willing to join the others in attempting to form a new company to buy this property. The attempt wholly failed, and I can see no ground on which we can grant any of the relief prayed, viz., either to make these defendants pay the unpaid residue of the alleged purchase money, or to declare the defendants liable for a conversion of the plaintiffs' property.

PATTERSON, J.A., concurred.

OSLER, J. A.—If this case is looked at apart from the question of the effect to be attributed to the placing the boats in the possession of the defendants or some of them, I think it impossible to put one's finger upon the evidence of an actual contract of sale written or verbal to these defendants.

If there was really a contract, no doubt it would be immaterial that the defendants only professed to enter into it on behalf of the proposed company, for that not being in existence there was no principal who could be bound by what they did and therefore they must be taken to have bound themselves personally, though neither of the parties to the contract contemplated such a result. *Star Corn Millers' Society v. Moore & Co.*, 81 L. T. 171 (C. A.); *Kelmer v. Baxter*, L. R. 2 C. P. 174; *Scott v. Lord Ebury*, *ib.* 255.

Obviously, however, no written contract with any one is created by the informal proposal (not of the company but) of the shareholders, to sell their shares and interest,

communicated to the meeting held on the 27th of March of the subscribers to the new undertaking, and the resolutions passed at that meeting. If the proposal and resolutions constitute a contract it would be a contract with all the subscribers present at the meeting, including Dr. Woodruff himself, but that is not contended, nor is the proposition maintainable for a moment. Nothing can be gathered from the resolutions but that a purchase was authorized to be carried out by the new company when formed: no immediate contract of sale and purchase was entered into, certainly none in writing, and I think both the defendants and Dr. Woodruff (who was actually the chief, or one of the chief promoters of the new company, and seems also to have represented the old company and the individual shareholders, repudiate as strongly as possible the notion that there was any intention of making a sale to the defendants, either individually or for the company.

But it is said that the defendants were authorized by one of the resolutions passed at the above meeting to take possession of the vessels and did so pursuant to the authority so conferred upon them. In the absence of an express contract we have to look at the circumstances to see whether any implied contract could possibly arise from the resolution and the action taken upon it. The case is not that of goods intended for immediate use and consumption being supplied to promoters or provisional directors for purposes connected with the proposed company, or of work done or services rendered at their request, where the delivery of the goods and the performance of the work or services would necessarily imply a promise to pay for them.

The shareholders of the old company were (with one exception) promoters of the new one, and the president attended the meeting of subscribers and was party to the resolutions passed thereat. The inference proper to be drawn from that resolution and the action taken thereon, is that the boats were placed under the control of the defendants with the assent of the plaintiffs, not in pursuance of any completed contract of sale, but in order that

pending the incorporation of the new company the necessary repairs which they were then undergoing might be continued at the expense of the subscribers; and that they might be available for use immediately upon the incorporation of the new company and the completion of the contract.

The payments which were made to Dr. Woodruff as president of the old company cannot fix a liability as purchasers upon these defendants, as they were made in pursuance of the understanding that the purchase money should be paid out of the sums subscribed.

There is no evidence upon which the defendants can be held liable as in trover or for a wrongful conversion of the plaintiffs' property.

I therefore agree in allowing the appeal.

Appeal allowed, with costs.

THE CORPORATION OF THE TOWNSHIP OF HUNGERFORD V.
LATTIMER.

Indictment—Reference to arbitration—Invalid award.

An indictment had been preferred against the defendant for obstructing a public road or right of way across certain lots; and after the trial thereof had proceeded sometime was unavoidably adjourned till another court, before the sitting of which an agreement to refer the indictment and all matters in dispute to arbitration was entered into. In pursuance of such agreement evidence was taken before the arbitrators who made an award that the defendant should pay twenty five cents damages to the municipality, and that each of the parties should pay his own costs of the criminal proceedings, and one half the costs of the arbitration, and if the whole of the latter costs were paid by one of them such party should be entitled to be repaid one half. The plaintiffs having paid the whole of these costs sued the defendant for a moiety thereof;

Held, [reversing the judgment of the County Court] that the submission having been entered into with the intention of abandoning, and for the express purpose of putting an end to the prosecution of the indictment, it was illegal and void, and could not be made the foundation of a binding award, and the action was dismissed, with costs; but under the circumstances the appellant was refused his costs of appeal.

AN appeal by the defendants from the judgment of the Junior Judge of the county of Hastings.

The action was by the corporation of the township of Hungerford against William Lattimer to recover the sum of \$106.20, with interest from the 30 of June, 1883, under the circumstances appearing in the judgment.

The appeal came on to be heard on the 25th of May, 1886.*

Lount, Q.C., and *Clute*, for the appellant.

G. D. Dickson, Q. C., and *Burdette*, for the respondents.

June 30th, 1886. OSLER, J. A.—This is an appeal from the judgment of the junior Judge of the County Court of the County of Hastings, discharging the defendant's order nisi to set aside the verdict and judgment at the trial on the ground of misdirection and other grounds.

The statement of claim alleged that the plaintiffs and defendant entered into an agreement to submit to arbitra-

**Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, J.J.A.

tion certain matters described in the statement of claim as "a certain indictment and all matters in difference between plaintiffs and defendant in respect to a public road or right of way across lots 17 and 18, in the 3rd concession of said township of Hungerford."

The arbitrators awarded that the disputed road or highway was a public road by dedication and user, and also by the expenditure of public moneys and the performance of statute labour thereon.

They also awarded twenty-five cents damages in favor of the township, and that each party should bear and pay their and his own costs respectively, of all litigation and proceedings had and carried on in the name of the Queen in the nature of criminal proceedings and incident thereto; and lastly, that each party should pay one-half of the costs of the reference and award.

The plaintiffs having paid the whole of the last mentioned costs, brought this action to recover the proportion which in that event became payable and was, by the award, directed to be paid to them by the defendant.

By his defence, after setting out the submission and award, the defendant alleged that there never was any valid submission and award—that the matters referred and awarded upon were not such as could legally be referred to arbitration, and that the indictment was referred without the authority of a Judge, and for these reasons that the award was invalid and void.

It appeared at the trial that an indictment, preferred at the instance of the plaintiffs, had been found against the defendant for obstructing the alleged highway mentioned in the pleadings. The defendant denied the existence of the highway, contending that the locus was part and parcel of his farm.

The indictment came on to be tried at an Assize for the County of Hastings, and the trial having been proceeded with for nearly two days, was postponed in consequence of the illness of the presiding Judge. Shortly before the next Assizes, there was a proposition to refer the matter to

arbitration, or to settle it. Witnesses were subpœnaed to attend the trial, but before the opening of the Assizes, the agreement of reference, which has been already spoken of, was signed. It appeared that after the arrival of the Judge at the Assize town, but before the first or opening day of the Court, he was told by counsel for one of the parties that they were trying to settle the case, at which he expressed his satisfaction, and that after the reference had been signed he was told in Court that the case had been settled, and replied that he had been saved a great deal of work. The leave of the Court to refer the case was not otherwise given. The misdirection complained of, in substance, was, the refusal of the learned Judge of the County Court to rule that the reference and award were invalid for the reasons assigned in the defence.

The decision in this case appears to me to turn upon what is the proper view to be taken of the object of the submission, not necessarily as defined by its language, but as established by the whole of the evidence. If its object or one of its objects was the settlement or abandonment of the indictment, then whether made with the assent of the court or not, it is illegal and void and cannot be made the foundation of a binding award, or entitle the plaintiffs to recover in this action.

The rule established by the authorities is that all agreements which have for their object the stifling of a prosecution for a felony or for a misdemeanor in which the public are interested, are contrary to public policy and void, and the sanction of the magistrate cannot render that legal which is otherwise invalid. But where in addition to the public misdemeanor an injury to the private rights of the prosecutor is also involved, then so long as the rights of the public are preserved inviolate either by the conviction or acquittal of the accused, the questions between the parties may with the leave of the Court, be referred or otherwise made the subject of agreement: *Keir v. Leeman*, 6 Q. B. 308, 9 Q. B. 371; *Regina v. Hardey*, 14 Q. B. 529; *Regina v. Blakemore*, 14 Q. B. 544; *Whitmore v. Farley*,

14 Cox Cr. Cas. 617 C. A.; *Baker v. Townsend*, 7 Taunt, 422, 1 B. Moore. 120.

The general question was considered and many of the cases referred to in the recent case of *Bell v. Riddell*, 10 A. R. 544, and in *Kneeshaw v. Collier*, 30 C. P. 265.

We may look at the position of the parties at the time the submission was agreed upon. An indictment preferred by the plaintiffs which was then immediately about to come on for trial, had been found against the defendant for a public misdemeanor viz.: a common nuisance in obstructing a highway. According to the evidence of one of the plaintiffs' witnesses "negotiations were opened to refer the matter to arbitration," with the view, as the evidence also shews of making it unnecessary to proceed with the trial; and it further appears that the result of the "settlement" supposed to have been effected by the reference, was, that the indictment was not tried.

The terms of the reference I will afterwards mention more in detail.

In *Russell* on Awards, 6th ed. p. 13, it is said that "Notwithstanding an opinion expressed in an earlier case, it is now decided that an indictment for non-repair of a public highway is not capable of being lawfully determined by arbitration, as it is not a case in which the party injured had a remedy by action."

The case cited for the proposition is *Regina v. Blakemore*, 14 Q. B. 544.

In that case, as in this, the indictment was for an offence of a public nature, the only difference being that in the former the charge was for non-repair of a highway which the defendant ought to have repaired "*ratione tenuræ*," while here it is for obstructing the highway. In principle therefore, the case is in point assuming the effect of the agreement in this case to be the same.

The leading case, and that upon which *Regina v. Blakemore* was decided, is *Keir v. Leeman*, 6 Q. B. 308, and in Error, 9 Q. B. 371.

That was an action on an agreement by which the

defendants in consideration that the plaintiff would not proceed further with the trial of the indictment for riot and assault, of which he was the prosecutor, promised to pay him a sum of money.

It was held that the action would not lie. The previous cases are reviewed, and the limitations upon the right to compromise a prosecution for a misdemeanor clearly defined.

Tindal, C. J., said: "It seems clear from the authorities brought before us that some misdemeanors are of such a nature that a contract to withdraw from a prosecution in respect of them is founded on an illegal consideration." He refers with disapproval to a class of cases in which it had been held that the consideration for an agreement being the settlement of an indictment for a misdemeanor *might* be good in law.

"Thus a settlement of an indictment for a nuisance preferred by public authority was held (7 T. R. 475) a lawful consideration for a bond binding the defendant to remove the nuisance, we presume on the ground, which is not very satisfactory, that the main object of the prosecution, the removal of the nuisance was thereby effected. But the Court seems to have overlooked the consideration that a defendant who had infringed a public right was thereby entirely freed from the punishment due to a violation of public law. In *Edgewcombe v. Rodd*, 5 East 294, Le Blanc, J., assigns this as a reason for the consideration being illegal, that there the prosecution was for a public misdemeanor, and not for a private injury to the prosecutor. It is difficult, to reconcile this principle, which we think a just one, with the decision in *Fullowes v. Taylor*, 7 T. R. 475, nor can *Pool v. Bousfield*, 1 Camp. 55, be reconciled with it. * * *

But there is a class of cases, such as *Beeley v. Wingfield*, 11 East. 46, and *Baker v. Townsend*, 7 Taunt. 422, which do not at all break in upon sound principles. These are cases where the *private rights* of the injured party are made the subject of agreement, and where *by the previous conviction* of the defendant the rights of the public are also preserved inviolate. It is very remarkable what very little authority there is, consisting of dicta rather than decisions, for the principle that any compromise of a misdemeanor, or indeed of any public offence can be otherwise than illegal, and any promise founded on such a consideration otherwise than void."

Lord Denman in the same case in 6 Q. B. 321, lays down the law in the same way, taking the distinction between cases which may be compromised and those which may not, to be that suggested by Gibbs, C. J., in *Baker v. Townsend*, 1 B. Moore 120, 7 Taunt 422, and Le Blanc, J., as above quoted.

The *Queen v. Hardey*, 14 Q. B. 529, is an instance of a valid reference so far as the point now under consideration is concerned. There there had been indictments for perjury and conspiracy arising out of disputes connected with partnership accounts. Verdicts of not guilty were taken on the indictments, and a nisi prius order of reference "of the indictments and of all matters in difference between the parties," was made.

It was strongly urged that the order was invalid because of the reference of the indictments, and because the costs of the indictments were referred, it being stated in the order that they were to be in the discretion of the arbitrator.

The Court, however, held, that as the verdict of not guilty stood, it was plain that the indictments were not in truth referred by the order, though it professed to refer them, since they were at an end by the verdict, and as regards the costs, if the arbitrator gave them to the prosecutor they could not be enforced under the indictments while the verdict of not guilty remained, and so must be enforced under the award only, "so that in truth the reference of the costs cannot be treated as an actual reference of the indictments."

All that was referred was "all matters in difference between the parties, those matters not being the subject of any proceeding in the Court." Patteson, J., says: "The rule is correctly stated by Gibbs, C. J., in *Baker v. Townsend*, 1 B. Moore 120, 7 Taunt. 422: 'Where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, though a criminal prosecution might have been commenced.' It should also be added (continues Patteson, J.) 'with leave

of the Court." In that case a verdict of guilty had been taken on the indictment, and the question of damages for the assault, and a disputed right of possession referred to arbitration on the recommendation of the Court.

In *Regina v. Blakemore*, supra, reported in the same volume, following *Regina v. Hardey*, there was no verdict on the indictment. Lord Campbell said :

"The agreement clearly refers the indictment as well as the subject matter, and therefore according to *Keir v. Leeman*, it is an agreement which could not be proceeded upon by action, and the Court will not interfere summarily to enforce it. And if we apply the criterion whether the subject matter of litigation is one for which the party injured had a remedy by action as well as by indictment, we find that the matter was not the subject of a civil action."

In *Whitmore v. Farley*, 43 L. J., N. S. 192, 14 Cox Cr. Cas. 617, Lush, L. J., said :

"Although the offence here was a felony, it would not matter if it were a misdemeanor, &c. It is a well established doctrine that an agreement to forego public rights, is an illegal agreement ; whether the felony could have been proved here or not, there is no doubt that a criminal charge was made and the prosecutrix could not legally withdraw it. The fact that the presiding magistrate consented to such withdrawal of the charge does not make it legal."

The case of *Fisher v. The Appollinaris Co.*, L. R. 10, Ch. 297, must be noticed because of an observation of Sir W. M. James, L. J. The plaintiff had been indicted for having unlawfully enclosed mineral water in bottles having thereon the trade mark of the defendant company. At the trial no evidence was offered, and a verdict of not guilty returned. In pursuance of an agreement made apparently while the criminal proceedings were pending, Fisher gave the defendants a written apology, authorizing them to make use of it in any way they thought proper. They published it, and continued to do so extensively as an advertisement. Fisher then brought an action to restrain them from doing so, contending that the agreement was

illegal and entered into under duress. James, L. J., said :

"This is one of those misdemeanors where the party injured has the choice between a civil and a criminal remedy. It was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance, or for not repairing a highway on the terms of the defendant agreeing to remove the nuisance or repair the highway. Offences of this kind are indictable, but it is not against the policy of our law to allow the injured person to enter into a compromise with regard to them."

None of the previous authorities are referred to, and the observation must be taken with reference to the facts before the Court, viz., that the charge compromised was one for which there was a civil as well as a criminal remedy, and that the indictment had in fact been disposed of in Court by a verdict of acquittal.

It only remains to consider the terms of the submission in the present case, though we are not, as I have said, necessarily driven to rely upon them.

Regina v. Blakemore was a motion to compel payment of the costs of the award, and the question there arose upon the terms of the reference alone. But in this case it is abundantly proved upon the evidence at the trial that the submission was entered into with the intention of abandoning, and for the express purpose of putting an end to the prosecution of the indictment.

I think the case might be disposed of on that ground, but an examination of the language of the submission will lead to the same conclusion.

It recites that for the purpose of testing the rights of the parties certain proceedings at law in the name of the Queen have been instituted, resulting in the finding of an indictment for a nuisance against the defendant, which is pending and proceeding to trial at the approaching assizes. That being willing to *save litigation* and settle their rights, the parties have agreed that all matters in dispute between them, as also all costs which have been already incurred,

or may be incurred by the said litigation, shall be left to arbitration. Then it proceeds :

"Now know ye, that for the purpose of *stopping all further litigation* about said disputed highway, the parties have agreed as follows: to refer all matters in difference between them in respect to a public road or right of way, &c., to &c., to whom all matters in difference are hereby referred."

Then the parties agree that the costs of the proceedings which have been already had, in consequence of the indictment, and incidental thereto, shall be in the discretion of the arbitrators, and that they shall decide all questions of damage, and *the payment of the costs of the litigation heretofore carried on* in the name of the Queen in the nature of criminal proceedings, stating in their award by and to whom the same shall be paid.

The submission therefore on its face shews that it was entered into for the purpose of stopping the pending litigation, that litigation being the indictment referred to therein, and of providing for the costs of the prosecution, besides the purpose, legitimate enough if it had been carried out in a legitimate way, of determining the question of the title to the road.

The plaintiffs I think fail in this action, and the appeal should be allowed, because whether the indictment was for a purely public offence, or one which involved also a question of disputed right, the agreement was intended, and operated, as an abandonment of, or withdrawal from the prosecution, the defendant in either case being freed from the consequence attaching to a violation of public law. It may be that in the present case that violation was of a trivial or merely technical nature, but this cannot affect the application of the principle.

I think, however, that upon the whole of the evidence it sufficiently appears that the defendant is taking advantage of the objection to rid himself of an agreement which he had deliberately entered into, and which, if carried out fairly might have put an end to litigation, and therefore

while the rule in the Court below must be made absolute to dismiss the action with costs, I think we may properly allow the appeal, without costs.

HAGARTY, C. J. O., BURTON, and PATTERSON. JJ. A., concurred.

Appeal allowed, without costs.

MCNEELEY v. MCWILLIAMS.

Written contract—Parol evidence to vary, inadmissibility of.

The defendants in writing offered the plaintiffs to "furnish scows and deliver all the stone required for the Omemee bridge as fast as you require them, for the sum of seventy-five cents per cubic yard," which the plaintiffs in writing accepted "at the price and conditions named." *Held*, [reversing the judgment of the C. P. D.,] that parol evidence could not be received to shew that the delivery was only to take place in case the water, along the lake and river route over which the stone had to be carried, was of such a height as would enable the defendants to use their steamers in towing the scows.

THIS was an appeal by the plaintiffs from the judgment of the Common Pleas Division, reported 9 O. R. 728, where all the facts are fully set forth, and came on for hearing before this court on the 11th of May, 1886.*

G. T. Blackstock, for the appellants.

Osler, Q. C., and *W. Cassels*, Q. C., for the respondents.

June 30, 1886. HAGARTY, C. J. O.—The defendants signed the following memorandum addressed to the plaintiffs:

"We will furnish scows and deliver all the stone required for the Omemee bridge as fast as you require them for the sum of 75 cents per cubic yard."

**Present*, HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

The short point for decision is: Can the defendants, sued for not delivering the stone, prove by verbal evidence that the parties agreed that whenever the water in the river fell below a certain mark they were to be relieved from any further delivery? They had delivered a portion, but refused to deliver the rest as the water had fallen. This case directly raises the right to vary the express terms of a written agreement by verbal testimony.

I wish to keep in mind the point for decision. It is not whether it was shewn that the agreement was never to become an operative, completed contract until the happening of a certain event or contingency. The cases referred to by my brother Burton are clear as to the right of parties to shew that the alleged contract was, as it were, to remain as an escrow till such event.

Here the contract was meant to bind from its inception, and became operative at once by being acted on and deliveries of stone made under it. There is no pretence here for re-forming the contract as it is not shewn that any term was omitted which the parties intended to be inserted.

The point is directly before us, as far as I know, for the first time whether the written obligation to deliver the stone as required, can by verbal evidence be turned into a bargain to deliver it if the water continues at a named height, or in other words to add a term that if the water fall defendants are excused from further delivery. We are not embarrassed I think by any previous decision in this Court at least. In one case of *Ellis v. Abell*, 10 A. R. 226 most of the authorities are reviewed. We were divided in opinion but I do not consider that the point there involved as to the existence of a verbal warranty on the sale of a chattel in any way affects the case before us. A warranty has been well defined as "a statement of something which the party undertakes shall be part of a contract, and though part of the contract yet collateral to the express object of it" *Chanter v. Hopkins*, 4 M. & W. 399.

It was a question as to the existence of a warranty which arose in such cases as *Bennett v. Tregent*, 24 C. P.

565; *Laroche v. O'Hagan*, 1 O. R. 300; *McMullen v. Williams*, 5 A. R. 518.

I think the true state of the law may be gathered from *Pym v. Campbell*, 6 E. & B. 370, and *Wallis v. Littel*, 11 C. B. N. S. 369.

In the first case there was the written agreement. The defence was, that it was not to be operative till approved by A., a third person. So the jury found, and the Court on full argument held the evidence admissible, and the defence made out.

Erle, J., says: "The point is, that this is a written agreement absolute on the face of it, and that evidence was admitted to shew it was conditional; and if that had been so, it would have been wrong. * * The distinction in point of law is that evidence to vary the terms of a written agreement is not admissible, but evidence to shew there is not an agreement at all, is admissible."

In *Wallis v. Littel*, the same point was substantially involved. Held, that it was competent for the defendant to prove by extraneous evidence a contemporaneous oral agreement that the written agreement should be void unless A. a third person assented to it in a reasonable time; such oral agreement operating as a suspension of the written agreement and not in defeasance of it. The counsel for the plaintiff admitted that the question was, whether the matter sought to be introduced was a condition precedent or a defeasance, and that it could not be shewn by parol that the agreement was to be defeated on the happening of a given event.

Erle, C. J., refers to *Pym v. Campbell*, and points out that if the oral agreement were a defeasance merely it would be in contradiction of the written agreement, which was in its terms absolute.

This view of the law seems to me to be fatal to the defence in the case before us. The written agreement was absolute as to the contract to deliver. It went into operation, and was partly performed. The oral bargain set up by the defendants seems clearly to operate as a defeasance of the absolute written contract, the right to claim full

delivery being defeated by a future contingency, viz., the falling of the water beyond the mark.

It is to be regretted if any injustice may be possibly done by a firm adherence to this rule of law. But its general relaxation in such cases as that before us would, I fear, be most disastrous in its results—unsettling all written agreements, and depriving parties of the protection to which they naturally trust in reducing their bargains to writing.

BURTON, J. A.—A good deal was said upon the argument as to this being an attempt to reform the contract, and that it was a proceeding therefore which was formerly within the exclusive jurisdiction of the Court of Chancery, but it is sufficient as to that part of the case to say that it is not a case for reformation. There is nothing omitted from the written contract which the parties did not deliberately intend to omit. It is perfectly clear, therefore, that it is not a case in which a Court of Equity would formerly have entertained a bill to reform.

The question would seem to resolve itself into whether the real contract was contained, and was intended by the parties to be contained, in the written memorandum. If it was, then it was not competent to the parties to show that the contract, absolute on the face of it, was conditional only. If the rule were otherwise, all confidence in written contracts would be destroyed, and the remark so frequently heard from the bench at a trial at *Nisi Prius*, "All this difficulty might have been avoided had the parties adopted the ordinary precaution of reducing the agreement to writing" will prove but a "delusion and a snare."

The production of a document purporting to be an agreement by a party with his signature attached, affords a strong presumption that it, and it alone, constitutes the agreement between himself and the other party to it, and if in fact he did sign it "*animo contrahendi*," the terms contained in it are conclusive, and cannot be varied by parol.

If of course it could be shewn that that instrument, though on the face of it purporting to be a concluded agreement, was not in fact a concluded agreement, and was not to become so until something else was done or some other person's consent obtained, that evidence would be admissible as shewing that it never had any existence as an agreement at all; the evidence there would not be to vary the written agreement, but to shew that it never was a completed agreement. I may refer, if authority is necessary, to such cases as *Pym v. Campbell*, 6 E. & B. 370; *Davis v. Jones*, 17 C. B. 625; *Rogers v. Hadley*, 2 H. & C. 227; *Wake v. Harrop*, 6 H. & N. 768; *Murray v. Earl of Stair*, 2 B. & C. 82. And I may add that in such a case the question for the jury would be whether upon the evidence the signed document was intended by the parties to be a contract, or was to become operative upon something further being done.

That infringes no rule of evidence, and was upheld as a proper question for the jury in *Clever v. Kirkman*, 33 L. T. N. S. 672. But when the parties have professed to set down their agreement in writing, then to use the expressive language of Lord Bramwell: "They cannot add to it, or subtract from it, or vary it in any way by parol evidence, otherwise they would defeat that which was their primary intention in committing it to writing. But where, at the time when a document which was apparently an agreement, was signed, the parties expressly stated that they did not intend it to be the record of any agreement between them, though this is a conclusion of fact which a jury should adopt with extreme reluctance, the parties would not, in such a case, be bound by the document, whether the signature is or is not the result of a mistake is immaterial. The reasoning proceeds on the ground that the parties never intended that the document should contain the terms of the agreement between them."

I may also refer to *Foster v. McKinnon*, L. R. 4, C. P. 704, where evidence was received to shew that the defendant was told that the instrument he was signing was a guarantee and not the indorsement of a negotiable instrument, and he signed it under that impression. The Court

held that it was a question to go to the jury whether he intended to execute such an instrument.

In all such cases you may ask the jury was there a contract. But you are not at liberty on its being shewn that a document was signed as a contract, that there were verbal stipulations at variance with the writing.

We are not now dealing with a class of cases where the parties have reduced their agreement to writing, and have at the same time on a distinct consideration negotiated by parol another agreement which is collateral, and on a subject distinct from that to which the written contract relates where evidence is admissible because it does not in the slightest degree trench upon the salutary rule of evidence to which I have referred, that the written agreement shall be the only exponent of the contract as finally concluded, and that proof of what was said or done during the negotiations shall not be received to supply terms with respect to which the writing is silent.

Such cases as *Lindley v. Lacey*, 17 C. B. N. S. 578, and *Mason v. Scott*, 22 Gr. 592 (in appeal) may be referred to as illustrations.

The cases of *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erskine v. Adeane*, L. R. 8 Ch. 766; and *Mann v. Nunn*, 43 L. J. N. S. C. P. 241, are cases proceeding on this ground. *Morgan v. Griffith* has been regarded as a case in which the line is very finely drawn, but the ground of the decision was that the verbal agreement was collateral to the lease, and did not affect the mode of enjoyment of the land demised.

The case was referred to in *Angell v. Duke*, L.R. 10 Q.B. 174, when that case was before the Court upon demurrer, but at the trial of that case, when oral testimony was tendered of an alleged promise in the course of the treaty for the lease, Blackburn, J., rejected the testimony, and held that the lease was conclusive as to all that referred to the taking of the house and furniture, and his ruling was subsequently sustained by the full Court. We sometimes hear regrets expressed by Judges, and in fact I see the learned Judge

at the trial did so at the rule being broken through which excluded parol evidence to vary the terms of a written instrument. I think if it could be infringed as it has been in this case it would indeed be matter for regret, but with great deference I think it will be found that none of the cases I have referred to at all infringe the old rule upon the subject.

The rule as enunciated by Mr. Taylor is, that where parties have deliberately put their mutual engagements into writing in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance.

The only safe criterion of the completeness of a written contract as a full expression of the terms of a party's agreement is the contract itself.

The question is one for the Court, for it relates to the admission or rejection of evidence.

"If the instrument," says Erle, C. J., "shews that it was intended to contain the whole bargain between the parties no extrinsic evidence can be received to introduce a term which does not appear there." Where the parties have by a written paper purporting to be complete on its face undertaken to define their agreement, parol evidence ought not to be admitted to add a single stipulation or vary the legal effect of those contained in it. But where, as in *Fitzgerald v. The Grand Trunk R. W. Co.*, 5 A.R. 601 a verbal contract has first been entered into and completed and in part execution of its terms written papers have been signed which shew upon their face that they do not purport to contain the whole contract, the terms of the entire contract may of course be shewn.

In *Powell v. Edmunds*, 12 East 6, a sale of growing timber was made by auction on printed conditions of sale which did not state anything as to quantity. Parol evidence was tendered that the auctioneer at the time of the sale warranted the quantity. The court refused to receive it. Lord Ellenborough remarking, "If the parol evidence were

admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement which would be setting aside all written contracts and rendering them of no effect."

In *Dutton v. Gerrish*, 9 Cush. 89, Chief Justice Shaw refused to receive parol evidence of a warranty that the premises were fit for the purpose for which they were let, on the ground that if there was any warranty it was part of the contract of hiring, and not something separate and independent, and must therefore be found in the writing.

It seemed to be conceded on the argument without, I think, due reflection that a warranty of quality made before or at the time of the sale being collateral, as the title would pass irrespective of the warranty was an exception, but that is not the law. If the contract has been reduced to writing, parol evidence is inadmissible to prove a warranty unless expressed in the writing: *Benjamin on Sales*, s. 621; *Addison on Contracts*, 219; *Kain v. Old*, 2 B. & C. 627. Oral evidence of such a warranty is admissible only where, as in *Allen v. Pink*, 4 M. & W. 140; and *Chapin v. Dobson*, 78 N. Y. 74; and *McMullen v. Williams*, 5 A. R. 518, the writing is an informal document, and does not, on its face, purport to contain the entire contract of the parties.

In the present case the letter and acceptance form a perfect and complete contract. On their face they purport to shew the terms on which the parties agree to deliver the stone and the price, which the others accept. The effect of allowing the introduction of the parol evidence is to add a term to the contract not to be found there, and inconsistent with it, and cannot, in my humble opinion, be done without breaking through the rule which permits parties to make their written contracts the only evidence of their agreements.

It may, of course, be frequently necessary to refer to extrinsic matters for the purpose of ascertaining what the subject matter of the contract was, but the mere circumstance that it might be necessary to resort to parol

evidence for such a purpose would be no ground for admitting parol evidence to add to the terms of the contract.

Here there is no evidence of a completed agreement anterior to the written contract. That written contract was, and was intended by the parties, to use the language of some of the cases, "to be the repository and memorial" of a concluded agreement. There is not a particle of evidence to shew the contrary.

That being so, it was the duty of the Court to exclude all parol evidence of an alleged term qualifying the absolute contract apparent on the face of the writing.

To hold that the written contract did not truly express the agreement of the parties from the mere fact that it makes no reference to the subject matter to which the parol evidence points would be a complete "petitio principii," and would abrogate the rule which wisely provides that such evidence shall not be admissible.

The Court, bound to observe legal rules, holds that no such parol agreement tending to vary the written agreement can be shewn; but a jury, having no knowledge of such rules and from a want of legal training, being incompetent to estimate the value of them, sanctioned though they are by the experience of centuries, would naturally say, this writing does not express the true agreement of the parties, and that with great deference is what, in my opinion, they have been asked to do in this case.

I referred fully to this question and the high authority of Mr. Justice Stephen, Lord Blackburn, and other eminent authorities in *Ellis v. Abell*, 10 A. R. at p. 246, and I now wish to add that of Mr. Justice Grove in the case of *Appleby v. Johnson*, L.R. 9 C.P. at p. 161, a discussion there arose as to the functions of the jury or the Judge upon a similar matter Counsel contended that it was for the jury not the Judge to say in the first instance whether or not the two letters constituted a complete contract, and that it was not till that was ascertained that the duty of the Judge to construe the contract arose, that the learned Judge at the trial had

in fact assumed the functions of the jury, to which Mr. Justice Grove replied: if you are right parol evidence would always be admissible however clear the written contract might be.

I am of opinion, therefore with the learned Chief Justice of the Common Pleas that the parol evidence was improperly received and that the appeal should be allowed, and the rule made absolute for a new trial.

PATTERSON, J. A., concurred.

OSLER, J. A.—I do not desire to decide anything more than the facts of this case call for, or to attempt to weaken or add another qualification to the rule as stated by Lord Blackburn in *Burgess v. Wickham*, 3 B. & S. 699, that according to the general law of England, the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties.

The single question is, whether the parol evidence which was admitted and upon which the jury acted, ought to have been admitted. We are not at all embarrassed by the question whether it was for the Court or for the jury to say whether the written memorandum signed by the parties, contained the whole of the terms of their agreement. It may be that it is involved as a matter of principle in the decision of the other question, but in this case the point is immaterial, because the omitted term being inconsistent with the written evidence of the contract, the finding of the jury cannot alter the real value of the controversy which is as to the competency of the evidence on which they proceeded: clearly it is for the jury to say whether the writing was intended to be a contract at all when that is the issue, but it may be different when for the purpose of letting in parol evidence of some matter upon which it is silent, but which is not inconsistent with its terms, the question has to be decided whether the writing was intended by the parties to be a complete record of their agreement: *Clever*

Kirkman, 33 L. T. N. S. 672; *Harris v. Great Western R. W. Co.*, 1 Q. B. D., 515, 533; *Bartlett v. Smith*, 11 M. & W. 483; *Naumberg v. Young*, 43 Am. 380, 15 Vroom, N. J. 331.

The latter appears to be a well considered decision on the general question. Many of the authorities, English and American, are cited and discussed.

The written agreement upon which the plaintiffs sue is absolute in its terms, and was admittedly intended to be at its date a valid operative agreement between the parties as far as it goes, and in reference to what they had been bargaining about. It was prepared and signed for the purpose of evidencing that bargain, and not for any other purpose.

The defendants now wish to prove that their verbal agreement contained another term, not mentioned in the writing, viz., a condition upon the happening, of which (and it has happened) they were not bound to do what the writing shews they agreed to do. Clearly this condition was not omitted by mistake, nor is relief sought on that footing.

I think the evidence was inadmissible. The case offers a fair illustration of some of the distinctions as to where extrinsic evidence may be given, and where it may not. For example, the writing does not mention the places from and to which the stone was to be carried. That might be proved by way of explanation as shewing the situation of the parties and the subject matter of the contract, or as a term supplementary to and not inconsistent with that part of it which was reduced into writing. So, also, the agreement of the plaintiffs to employ and pay the defendants' men for loading the stone upon the vessel, might be proved as an agreement collateral, and not contrary to the tenor of the written agreement. The latter is an essential ingredient in all qualifications of the rule.

But the evidence actually offered and admitted in this case varies, and contradicts the terms of the writing, for it shews that upon the happening of some condition subsequent the

defendants were not bound to perform their contract. The case of *Pym v. Campbell* shews the distinction, which is fatal to their case: "The point made is, that there is a written agreement, absolute on the face of it, and that evidence was admitted to shew that it was conditional, and if that had been so it would have been wrong. The distinction in point of law is, that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there was not an agreement at all is admissible. See, also, *Clever v. Kirkman*, 33 L. T. N. S. 672.

That the river should continue to remain for the rest of the season in a navigable state was not an implied condition of the contract, and therefore, as the learned Chief Justice of the Court below points out, the principle of such cases as *Taylor v. Caldwell*, 3 B. & S. 826, *Howell v. Courtland*, 1 Q. B. D. 258, does not apply. That was something for which the parties should have made express provision *Dorland v. Bonter*, 5 U. C. R. 583, and having entered into a positive written contract, the terms of which are inconsistent with that having been done, it cannot now be added as a parol term.

The answer of the jury to the 4th question shews that the performance of the contract had not become impossible but merely unexpectedly burthensome.

There is reason to fear that the defendants suffer in this from their own weakness in relying upon the plaintiffs honor and honesty, but it is better that a mischance of that kind should occasionally happen than to break in upon a rule the soundness of which has been so thoroughly tested. If it does not exclude the evidence admitted in this case, I think its usefulness is gone.

In other respects I see nothing to complain of in the conduct of the trial. It was very earnestly pressed that the learned Judge ought not to have asked the jury additional questions after they had returned into Court with their answers to the written ones at first submitted.

It was, however, no less the right than the duty of the learned Judge to submit such questions if he deemed it

necessary (and it clearly was so here) to do so in order that all the facts necessary for the proper disposition of the case might be determined.

For the foregoing reasons and for those stated in the able judgment of Chief Justice Cameron in the Court below, I think the appeal should be allowed, and the rule made absolute for a new trial if the parties cannot agree upon the damages.

Appeal allowed, with costs

BRUNDAGE V. HOWARD, SWINYARD, AND THE NIAGARA
RIVER HYDRAULIC COMPANY.

Vague agreement—Specific performance—Accord and satisfaction.

The plaintiff, suing as assignee of an appeal bond given by the defendants to G. & M. on an appeal which was dismissed, by S. and the N. R. H. company from a judgment recovered by G. & M., claimed the amount of the judgment with costs and interest, less a sum realised by the sheriff on G. & M.'s fi. fa. goods by the sale to the plaintiff of a mill and fixtures erected by the N. R. H. Co., on Crown lands which the company occupied under a letter of license from the Commissioner of Crown lands.

The defendants were shareholders in the company and after the sheriff's sale they and the plaintiff agreed to take steps to reorganise the company, the plaintiff to accept shares in satisfaction of his claim. This agreement which the plaintiff had refused to carry out was relied on as a defence to this action.

At the trial the learned Judge held that the agreement was too vague for specific performance and was therefore no defence; and being of opinion that nothing passed by the sheriff's sale to the plaintiff he gave judgment for the whole amount of the original judgment of G. & M. with costs and interest, against the wish of the plaintiff who claimed only the reduced amount.

The defendants moved against the judgment respecting the agreement and a Divisional Court of two Judges, while agreeing that it was too vague for specific performance, differed as to its affording a defence to the action.

The plaintiff also moved to reduce his judgment by deducting the amount of his bid at the sheriff's sale but that order by reason of the Judges not agreeing was not granted.

On appeal by the defendants it was

Held, that the agreement was only to accept shares in case the company was reorganised, and such agreement afforded no defence to this action; and that the judgment could properly be varied by entering it for the reduced amount. The appeal was therefore dismissed, with costs.

APPEAL from the Queen's Bench Division.

The action was by James T. Brundage against George Henry Howard, Thomas Swinyard, and the Niagara River Hydraulic Company, and the statement of claim alleged that in an action in the Chancery Division of the High Court of Justice for Ontario, wherein John Goldie and Hugh McCulloch were plaintiffs, and Peter Secord and the Niagara River Hydraulic Company were defendants, Goldie & McCulloch on the 4th of April, 1882, recovered a judgment against the defendants for \$2,000 and interest from the 1st May, 1880, together with the costs of suit from

which judgment the company appealed to the Court of Appeal:

That on the 6th of May, 1882, the defendants executed an appeal bond in the penal sum of \$5,600, subject to the usual condition for effectually prosecuting such appeal:

That on such appeal the said judgment was affirmed in full, with costs, by reason of which and the said bond the defendants became indebted to Goldie & McCulloch in the sum of \$2,000 and interest, and \$350, the amount of their taxed costs and interest.

It was further alleged that by two several indentures of assignment bearing date respectively the 3rd and 12th of September, 1883, Goldie & McCullough assigned to the plaintiff the said judgment and appeal bond and the moneys thereby secured, and all rights of Goldie & McCulloch thereunder, and that the judgment and appeal bond remained unsatisfied and unpaid except as to a small part thereof, to wit, \$600, an amount realised by the sheriff of Welland, under an execution issued upon that judgment.

The plaintiff claimed to be entitled to judgment for \$2,300 being the balance due on said bond including interest.

The defendants by their statement of defence set up that under the writ of fieri facias, against the goods and chattels of the defendant company, the sheriff at the request of the plaintiff and Goldie & McCulloch, went through the form of a sale of the interest of the defendant company in a large brick building erected for a mill, and certain mill machinery, water wheels, shafting, belting, stones and other appurtenances connected with the building and affixed to the freehold, and therefore not saleable under a writ against goods, and the plaintiff became the pretended purchaser thereof, for the price or sum of \$710.00 or thereabouts.

That the mill and other fixtures were erected on and formed part of certain Crown lands, in the town of Niagara Falls, and had been erected by the defendant

company, of which the other defendants were large stockholders, at a large expense far exceeding in amount the whole of the judgment referred to, and were so erected on a letter of license from the Crown Lands Department, under which it was provided that the said lands should, on performance of certain conditions, become the property of certain persons who afterwards formed the defendant company.

That on the plaintiff becoming such purchaser of the said mill and judgment of Goldie & McCulloch, upon which writs of execution were in the hands of the sheriff against the defendant company, for the whole amount of the claim, the plaintiff made an application to the Commissioner of Crown Lands, for a patent or lease of the said lands, and the exclusion of the defendants from the same, on the ground that he had become the owner of the said mill and fixtures; which application the defendants opposed, and appeared with the plaintiff before the said commissioner on such contest, which was postponed and no decision had been given by the said Commissioner.

After such postponement the plaintiff and defendants, together with one Henry Pearce, another large stockholder in the company, with a view to compromising the action and all matters in difference, entered into an agreement in these words:

NIAGARA FALLS,

Ontario, Canada, 1st Dec., 1883.

The undersigned jointly agree to re-organize the Niagara River Hydraulic Company, for the purpose of carrying out the original intentions of the company, on the following basis:—

1. The Government to be urged to issue to the company a perfect lease of the property to it.

2. The company to assume Mr. Brundage's claims upon the property for the full amount he has paid for the same, and to issue to him fully paid up shares of the company on the same basis that shares have already been issued to the shareholders of the company, the present shareholders of the company retaining their present holdings in the reorganized company.

Upon this understanding the parties hereto agree to meet forthwith, to obtain a perfect lease from the Government for as long a period as the Government will consent to, and to decide upon any increase in the

capital in the company that may be necessary to carry out the undertaking in a successful manner, and to promote the interests of the company generally.

J. T. BRUNDAGE.
THOS. SWINYARD.
H. F. PEARCE.
G. H. HOWARD.

The defendants further alleged that they had always been ready and willing to perform their part of said agreement, and submitted that the same should be carried out and enforced under the order and direction of the Court, and all proceedings in the action stayed.

After joining issue on this statement of defence the plaintiff obtained leave to put in an amended reply which he did, the nature of which is set forth in the judgment.

The case came on for trial before Armour, J., and a jury at Hamilton, on the 3rd of January, 1883.

After the case had been opened, his lordship discharged the jury.

The plaintiff and the defendants Howard and Swinyard, and Henry Pearce above mentioned, were examined as witnesses, the object of the plaintiff being to shew that he had signed the memorandum of agreement in consequence of representations made to him by the other parties thereto, which he said were incorrect; that of the defendants to shew that the plaintiff was fully informed of the contents of the agreement, and that he perfectly understood the nature and effect thereof.

After taking time to look into the cases cited, the following judgment was on

February 22nd, 1884, delivered by ARMOUR, J.—I find that the plaintiff is entitled to recover against the defendants in respect of his claim in this suit, the sum of \$2,000, together with interest thereon from the first day of May, 1880, till the entry of judgment herein. I also find that the plaintiff is entitled to recover against the defendants in respect of his said claim, the further sum of \$233.72, together with interest thereon from the sixth day of May, 1882, to the entry of judgment herein. And I find that the plaintiff is entitled to recover against the defendants in respect of his claim, the further sum of \$84.82, together with interest

thereon from the twenty-second day of January, 1883, till the entry of judgment herein; and I direct that judgment be entered for the plaintiff against the defendants for the said several sums, together with interest thereon, as above set forth, and with full costs of suit, on and after the fifth day of next Easter sittings.

There was no evidence before me on which I could find what amount, if any, the plaintiff was entitled to give credit to the defendants for, in respect of an alleged sheriff's sale that was said to have taken place under an execution alleged to have been issued upon the judgment referred to in the plaintiff's statement of claim; but, from what was said by counsel for both parties, I infer that such sale passed nothing and ought to be set aside and vacated, and so far as I have the power I set aside and vacate such sale; and the defendants not objecting, this sale being set aside and vacated, to pay the full amount which I have found the plaintiff entitled to recover, I direct and order them to pay the same accordingly.

I find that the agreement set up in the defendants' statement of defence, and dated the first day of December, 1883, was entered into and signed by the plaintiff and by the defendants, and that the plaintiff, at the time he so signed the same, was well aware of the nature and effect, and of the contents of the same, and fully agreed and consented thereto, and that it was not obtained from him by any misrepresentation or by any concealment of any material fact connected therewith; or by any undue influence whatever, neither did the defendants in any way dissuade the plaintiff from consulting counsel with respect to his signing the same, nor did they represent to the plaintiff that it was only a preliminary matter of form, and would not be binding upon him until his counsel was satisfied with the sufficiency of its terms: and I find that the said agreement was entered into by all parties to it with a full knowledge of its contents, terms, nature and effect, and that it was intended by all parties to be a binding agreement and a settlement of this action; but I find that the said agreement is too vague, indefinite and incomplete to be the subject of specific performance, and is therefore no defence to this action.

The defendants thereupon moved the Divisional Court composed of two Judges, for an order to set aside the ver-

dict and judgment for the plaintiff and to enter a verdict for the defendants, which application was refused.

The plaintiff also moved to reduce the verdict in his favor by the amount realised on the sheriff's sale. This, in consequence of a division of the Court, was not granted.

The defendants thereupon appealed to this Court on the ground "that the agreement proved at the trial forms a complete defence to the action, whether the agreement is technically such as would be specifically performed or not."

The plaintiff in support of the judgment contended that the agreement of the 1st December, 1883, above set forth, formed no defence to the action, being too vague, indefinite, and incomplete to be the subject of specific performance.

The plaintiff also gave notice by way of cross-appeal of his intention to contend that that part of the verdict or judgment, which sets aside the sheriff's sale should be rescinded, and that the amount of the judgment should be reduced by the net proceeds of such sale, for the following reasons :

(1) The validity of the sheriff's sale was not in question in the action, and the learned Judge at the trial ought not to have set aside or vacated the same, and judgment ought to have been given for the residue unpaid upon the judgment in the case of *Goldie et al. v. Secord and the Niagara River Hydraulic Company*, after crediting the proceeds of the sheriff's sale as claimed, and the Divisional Court ought to have made absolute the plaintiff's motion to reduce the verdict accordingly. (2) The fact that the plaintiff seeks to recover only the residue of such judgment does not affect the question of the validity of the sheriff's sale. (3) The judgment as it now stands is embarrassing, giving the plaintiff a larger sum than he claims is due to him, and vacating a sale not questioned by the pleadings, and as to the validity or invalidity of which no evidence was given at the trial.

The appeal came on to be heard on the 13th of November, 1885.*

**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, JJ.A. and GALT, J.

Delamere, for the appellants.

Osler, Q.C., and *Teetzel*, for the respondent.

December 23, 1885. PATTERSON, J.A.—The plaintiff in his statement of claim sets out that Goldie & McCulloch recovered judgment in the High Court against Secord and the Niagara River Hydraulic Company, which judgment was affirmed by this Court, the present defendants being the obligors in the appeal bond: that the defendants thus became indebted to Goldie & McCulloch in \$2000 for debt, with interest from 1st May, 1880, and \$350 for costs taxed: that Goldie & McCulloch assigned the judgment and bond to the plaintiff: and that the whole amount remains due except about \$600 realised by the sheriff under execution issued upon the judgment: and the plaintiff asks for judgment for the balance secured by the bond with interest.

The defence alleges in effect that under a *fi. fa.* against goods issued in the suit of Goldie & McCulloch, the sheriff went through the form of a sale to the plaintiff of the interest of the company in a mill and its machinery, which was affixed to the freehold, and, as the defendants contend not saleable under *fi. fa.* goods, for \$710 or thereabouts: that the mill and fixtures had been erected by the company on Crown lands held under a letter of license from the Crown Lands Department: that after his purchase the plaintiff made an application, which the defendants opposed, to the Commissioner of Crown Lands for a patent or lease of the lands to the exclusion of the defendants, on which application no judgment had been given by the commissioner: and that, with a view to compromising this action and the contention before the commissioner, an agreement had been made between the plaintiff and the defendants Howard and Swinyard and one Pearce. I shall read the agreement from the exhibit in evidence, which is not quite the same as set out in the statement of defence. The defendants further allege that they assented to the agreement for compromise, and are and always have been

ready and willing to perform their part of the same, and hereby offer so to do; and they submit that it should be carried out and enforced under the direction of the Court, and all proceedings in this action stayed.

The agreement is in these words: [His Lordship here read the agreement set forth at page 339.]

The plaintiff joined issue on this defence, and afterwards by leave, replied specially. He charged that the agreement was obtained by misrepresentations and concealment of material facts by the other parties thereto, and also by undue influence; adding particulars which I do not note at present, because the charges were not sustained by the evidence, as was decided at the trial and in the Divisional Court, and in our opinion correctly so decided. He further set up that the agreement had no reference to the claim under the bond or to this suit, but had sole reference to the property purchased at the sheriff's sale: that it was a mere preliminary agreement and was not to have any binding effect until the company was reorganised and in a position to assume the claims of the plaintiff; that the company never has been reorganised and has never assumed his claims or been in a position to do so, but remains insolvent and unable to carry out the proposed agreement: and that the agreement is inequitable and if specifically performed would operate a serious injustice upon the plaintiff.

I need not refer to the affairs of the company which it was proposed to reorganise, beyond the facts that it had been incorporated for the purpose of utilising the water power of the Niagara river, and had constructed works which, before the sheriff's sale, had been so far swept away by the force of the water as to be for the time useless, and incapable of reconstruction without an outlay of money which the company was not in a position to make.

The mill was built and the works constructed on Crown land, the only title of the company being a letter from the Commissioner of Crown Lands, and there being obstacles in the way of obtaining a lease, partly arising from the pro-

posal to make a public park in which these lands would be embraced. All the stock of the company was owned by Messrs. Howard, Swinyard, and Pearce and a Mr. Drew who was not a party to the agreement, but who signified his ratification of it shortly before the trial of this action.

The action was tried before Mr. Justice Armour who held that the agreement was too vague, indefinite, and incomplete to be the subject of specific performance, and was therefore no defence to the action. He found that the plaintiff was entitled to recover against the defendants these sums, viz, \$2000 with interest from 1st May, 1880 : \$233.62 with interest from 6th May, 1882 ; and \$84.82 with interest from 22nd January, 1883.

Those sums constituted the whole of the debt and costs without any deduction for the amount made under the sheriff's sale.

With respect to that amount the learned Judge said : " There was no evidence before me on which I could find what amount, if any, the plaintiff was entitled to give credit to the defendants for, in respect of an alleged sheriff's sale that was alleged to have taken place under an execution alleged to have been issued upon the judgment referred to in the plaintiff's statement of claim ; but from what was said by counsel for both parties, I infer that such sale passed nothing and ought to be set aside and vacated, and so far as I have the power I set aside and vacate such sale ; and the defendants not objecting, the said sale being set aside and vacated, to pay the full amount which I have found the plaintiff entitled to recover, I direct and order them to pay the same accordingly."

This disposition of the matter of the sheriff's sale was made against the desire and protest of the plaintiff who asked only for judgment for the debt less the amount of that sale.

The sale was not formally proved, and inasmuch as no issue was raised by the pleadings with regard to it, there was no occasion to adduce evidence about it. The fact of the sale was admitted by the defence, and the amount there stated of \$710 might, in the absence of further information, have been properly taken to be the credit to

which the defendants were entitled. Either party would of course have been at liberty, if the computation were really in dispute, to offer evidence on the subject either on the trial, or in the Divisional Court, or here; but nothing has been suggested to create a doubt of the correctness of the amount given in the statement of defence, and the plaintiff is content to credit that amount.

Both parties moved in the Queen's Bench Division against the judgment; the defendants insisting that the agreement afforded a full defence to the action, and the plaintiff complaining of the interference with the sheriff's sale. The motions were heard before a Divisional Court composed of the Chief Justice of the Queen's Bench and my brother Osler who agreed that the validity of the sheriff's sale was not a matter in issue and ought not to have been adjudicated upon. They also agreed that the learned Judge who tried the action was right in holding that the agreement was not a proper subject for specific performance; but they did not agree in his conclusion that therefore it formed no defence to the action. The contention was, that the agreement had been accepted either in accord and satisfaction or in some way as a substitution for the claims of the plaintiff.

The opinion of my brother Osler was against that contention, but his lordship the Chief Justice took a different view.

I agree with my brother Osler in his conclusion upon both points of the case, and I agree so fully with the reasons given in his judgment for his opinion that I shall only add a few words of my own without going over the same ground.

I do not doubt that, in making the agreement, it was intended by all parties that all the plaintiff's claims should be dealt with, and not merely whatever interest he had acquired in the property under the sheriff's sale. But how were they dealt with? He was to receive and accept as satisfaction for them shares in the company, not as it then existed but after it was reorganised. But something

had to be done before the company could be reorganised. The basis of the reorganisation was to be the obtaining of a lease of the property from the Government. Mr. Swinyard tells us in his evidence that the idea of re-organising the company occurred to him during the interview with the plaintiff at which he discussed and rejected two propositions made by the plaintiff, and then suggested as a more equitable one that which is the subject of the document before us; and he adds "We went thoroughly into the thing, and in consideration that we were going then to the Government to get a perfect lease, by which we should be enabled to go to the public to raise the necessary money for the development of this property, he put in his claim on the same basis as we should with regard to the stock of the company."

Again, further on in his evidence: "Q. Was any statement made by Mr. Brundage as to his going to Hamilton for any purpose in connection with the agreement? A. Then? Q. Yes. A. No; I told him that I was going to Toronto on the Tuesday, and I suggested that he should come along with me, in order to lay the agreement before the Commissioner, and urge the Government to issue a perfect license, to enable us to be present at that meeting to reorganise on that basis. We wanted to get it for forty years, the same as the company had applied for."

This evidence seems to support the inference which I should draw from the terms of the agreement itself, that the proposition to which the plaintiff assented was that he was to accept shares in the reorganised company, at the same rate of discount at which the shares in the original company had been issued, to the amount of his claims, but he never agreed that they should be satisfied in any other way. He did agree to co-operate with the others in obtaining the lease which was the essential preliminary to the reorganisation of the company. If it had been obtained the question of the increase of the capital stock was to be decided. The promoters were to "go to the public" inviting others to put their money into the concern as shareholders; and under the new state of things it

might not be a matter of course that the plaintiff could have the shares allotted to him on the proposed terms. It could scarcely be contended that he could sustain an action upon the agreement against the other parties to it, or against the company, by reason of the refusal of the company so to allot the shares; and I apprehend that until they were so allotted to him his debt would remain unsatisfied.

I do not see anything in the agreement to prevent any one of the parties from withdrawing from it, as the plaintiff did, at any time before it was acted on.

Then what if, notwithstanding the united efforts of the four parties to the agreement the lease could not be obtained? Clearly the company could not get the stock. Yet, if the argument is sound, the plaintiff's claims against the defendants would be legally barred.

I think the proper understanding of the matter is, that it was a preliminary negotiation with a view to an ulterior settlement, the plaintiff saying to the other three gentlemen: "Reorganise your company and allot me stock at a reduced rate to the amount of my claims, and I will accept it in satisfaction; and in the meantime as you cannot reorganise unless you obtain a lease similar to that for which I am myself applying, I will not let my application stand in your way, but will co-operate with you in your effort to get a lease granted to the company."

On the question of the amount of the judgment I have nothing to add to what was said in the Divisional Court with which I entirely concur.

The Registrar can compute the amount from the figures given by Mr. Justice Armour, deducting \$710 as of the date of the sheriff's sale, which date he can ascertain from the solicitors.

The judgment will be varied in the amount, and the appeal dismissed, with costs.

HAGARTY, C.J. O., BURTON, J. A., and GALT, J., concurred.

Appeal dismissed, with costs.

SEALE V. JOHNSTON.

Real Property Limitation Act—Title by possession—R. S. O. ch. 108.

In 1868 B. being the owner and occupant of the east half of lot one in the village of Oil Springs, took possession of the garden, &c., on the west half of such lot on which there was a dwelling house occupied by a tenant, and enclosed the land by a fence with his own lot; and in 1872 the house having been deserted by the tenant or occupant took possession of that also, repaired it and used it as a workshop. In the same year A. who was at one time the owner of such west half removed the doors and windows of the dwelling, and never afterwards returned to the premises. Thenceforward B. remained in undisturbed possession of the house and land, repairing and cultivating the same, and also paying the taxes levied thereon until in October, 1884, he sold the property to the defendant.

Held, that B. by virtue of such possession and through B.'s conveyance to him, the defendant, had acquired a good title under the "Real Property Limitation Act."

THIS was a proceeding under the Consolidated Railway Act 1879, by which the Canada Southern Railway Company sought to expropriate a lot in the village of Oil Springs, and in which the company had paid into Court \$350, being the compensation to be paid for the property under an agreement made with the defendant; and notice was duly published calling on all persons interested or claiming to be entitled to or interested in said land to file their claim to such compensation or any part thereof, in the office of the registrar of the Queen's Bench Division, in order that a distribution might be made by that Court.

The defendant filed an affidavit in the terms following:

"That on the 1st day of October, 1884, I purchased from John Quick Braund, of * * the west half of lot No. 18, in Range 1, in sub-division of lot No. 16, in the 2nd concession of the township of Enniskillen, in the county of Lambton, and now in the village of Oil Springs, although I never entered into possession of the said premises, and the said John Quick Braund continued in possession of the said premises up to the 18th day of October, 1884, when it was taken possession of by the Canada Southern Railway Company.

"I have never acknowledged the title of any person, or given any right to control the possession of the said premises until taken possession of by the Canada Southern Railway Company, nor was any claim to the said premises made by any one."

An affidavit to the same effect was also made by Braund.

Upon the application of the defendant, and counsel for the plaintiff, (the only other claimant to such compensation) and for the Canada Southern Railway Company consenting, an order was made on the 30th of March, 1885, referring it to the Master of the Court at London,

"To inquire and state what claimants have filed claims in respect of the moneys paid into Court to the credit of this matter as aforesaid, and to ascertain and state which of said claimants is or are entitled to the said moneys or to participate in the same, and the proportions thereof, and to report the same to this Court, together with the nature of the claims made to the said moneys, and any special circumstances in respect thereof at the request of any party."

In proceeding on this order Braund was examined as a witness on behalf of the defendant, and swore—

"I am the grantor in the deed, which has been put in, to Mr. Johnston. I know the west half of lot 18, as to which the money now in Court is in question. I owned the east half of the same lot before I conveyed to Mr. Johnston. I went into possession of the west half of the lot. I got possession of a part of the west half in 1868—the most of it—all but the dwelling-house. I occupied the garden part, that was about one-third of the whole; that was before 1868. I occupied all but the dwelling-house in 1868, and used the garden for vegetables. I planted the garden before Andrews left the house; the garden was a third of the west half, and adjoined my lot, on the west of mine. I fenced in the garden with my half—the east half. I had possession of all but the dwelling-house. * * I got possession of the dwelling-house in 1872. Andrews sent and took away the doors and windows at that time, but I had used the house before. I had possession when the Canada Southern Railway Company took the land. * * There was no one at all in occupation of the dwelling-house or any part of the premises except myself. * * Andrews went away in the fall of 1868, and his wife in the spring of 1869. I used the stable from 1869 to 1872 as a carpentershop. * * After Jackson left the butcher's shop, and Clement left the house, no one was in possession but myself; and my boys had the use of the stable by my leave. My possession had not been interrupted in any way, until I conveyed to Johnston. * * The time that Jackson had the butcher's shop he also had the house; all other persons were out of the house by 1870, and from 1870 to 1872, I occupied it. In 1872 I made the repairs, and from that time used it as a workshop. At the time that Andrews left the property business at Oil Springs went down; it went down in 1867 and 1868. I could get no work there. * * * * *

During all this time Mr. Seale was not near the place; the last time he was there was before Andrews went away, in 1869 or the fall before, until the land was sold. During the time I have been there, I have paid the taxes on the land in question.

I first knew that Mr. Seale claimed the lot just before Johnston sold the lot to the railway. Up to that time I did not know that Mr. Seale claimed to own the property. I did not talk to Andrews before he went away about the property—that is positively true. I took possession of the property because it was left open, and was worthless; that was my only right to it. I thought Mr. Andrews was the owner of it. I don't know that I intended to keep the property when I went into it. The place suited my purposes. I did not at any time after that speak to Andrews about it. I only saw him once after, here in London, at the station. * * I did not speak to Andrews about this land then. There was no intention on my part to keep the land at that time; I was holding it by possession at that time. I did not intend to appropriate the property. No one ever asked me who I was holding it for. If Andrews or Mr. Seale had asked me then to give up the land I would have done so. I paid all the taxes upon the land up to this time. When Andrews took away the doors and windows in 1872, I was in possession of the land. I did not know if he had any right then, and did not know I had any right to stop him. * * I thought that Mr. Seale was agent for the place. I did not know that he owned it. I thought Andrews had been the owner and that I was the owner of it at that time, in 1882. * * *

I think I said nothing about the possession of the lot: that is the best answer I can give. I understood Mr. Andrews was the owner at that time, and I believed he was. I claimed that no one could put me out of the property at that time under the Limitation Act. * * I do not remember whether I mentioned to Mr. Seale or not about the Statute of Limitations. I will not swear positively that I told him I claimed under the statute, or that I did not tell him. I don't think the question came up at all then. I did not tell him until he came to Oil Springs. * * When I came to see Mr. Seale, he said I might go back and get a lease drawn from the date back to when I had the land some sixteen years, and to carry it on five years further, either to myself or my son, and send it to him and he would sign it; I told him I had it for sixteen years; after he spoke about the lease I did not claim it as my own then to Mr. Seale, not until he came to Oil Springs. I did not agree to take a lease on that occasion; we parted on that, and I did not say whether I would do it or not. I never answered Mr. Seale's proposal. * * *

I knew Andrews was the owner of the land, and I never knew till I saw the abstract that he conveyed it away. My claim to the land is one by possession under the statute. I don't pretend and never pretended that I had any deed of the land. In 1872, Andrews sent two teams and took all the stuff away. I did not take any lease from Mr. Seale nor from Mr. Andrews. I never agreed to give Andrews any rent for the place or any part of it. It was after 1872, when Andrews had taken away the better portions of the buildings, that I made the improvements.

William McMillan was also examined and swore—

"I know the land in question, and know John Q. Braund. I could not tell how long he has been in possession of the lot in question, but I

know he was in possession since the summer of 1872, to the time he sold the land last fall; he was in possession of the whole of it. I don't know of any one else having been in possession all that time.

James Seale, the plaintiff, was also examined on his own behalf and swore—

“A deed has been put in made by Andrews to me of this land. I produce a lease from myself to Mr. Andrews from 23rd May, 1867, for one year of the premises in question. Andrews stayed there by my permission before this lease, and I gave him the lease afterwards. I think he left the town of Oil Springs in 1868 or 1869. I was down there a short time before he left, perhaps the year before. Mr. Andrews died ten years ago last May, and his wife a year later. When I was there * * Braund was in possession. I did not see Mr. Braund there; he wrote to me afterwards. I saw him in London four years this coming September, at the fair. He came to me. I did not know him. He said he understood I was about to sell the property at Oil Springs. I said no; I had no idea of selling it, as I intended to keep it until Mr. Andrews's son was of age. I said that the boy was born there, and perhaps might want to keep the property, and I had no idea of selling it at all. He then asked me if I would lease it to him on the same terms as he had it from Mr. Andrews, and I said I had no objection to that. I knew what the conditions were before, and Braund told me that he was to pay the taxes and keep the place in order, and I said he might have it on the same terms, and he said he had paid the taxes all along, and he would still keep them paid up and keep the place in repair. I told him to go and have a few lines drawn up and I would sign them. He did not get that done, and he did not come back, and I never heard from him after that. He agreed to lease it on the same conditions as he had it from my son-in-law, that is, to pay the taxes and keep the place in repair, and if I wanted it before the boy was of age, which would be in five years, he told me he would give it up at any time on a week's notice. That agreement was not changed in any way since, and I was thunderstruck when I went up there and found he had sold the property. When in my office, he said to me that he had been told he could keep the property, but said he would not ‘cheat an orphan child, that he ‘would sooner have his head taken off.’ He did not say that he had been there for sixteen years; he did say he had been there for twelve or thirteen years; he said nothing more about the Statute of Limitations than what I have said; he said he ‘would not do such a mean caper.’ In 1872, Andrews had my permission to remove the buildings as he did.”

The other material facts appear in the judgment.

On the 5th September, 1885, the Master at London made his report, stating that no claimants on the fund other than Seale and Johnston had proved any claim before him in respect thereof, and found “that the said James Seale, one of such claimants, is entitled to the whole of the said money so paid into Court.”

From this report of the Master, the defendant appealed to the Judge presiding in Single Court, and the same came on before Wilson, C. J., who, after hearing counsel for both parties, ordered that the "findings and report of the said Master, in so far as they find, the said James Seale therein mentioned, to be entitled to the moneys paid into Court, be and the same are hereby set aside. And it is further ordered and declared that the claimant James H. Johnston is entitled to the whole of the said moneys," and ordered the same to be paid out to him accordingly.

From this order the plaintiff appealed, and the appeal came on for hearing on the 9th of March, 1886.*

M. D. Fraser, for the appellant.

Aylesworth, for the respondent.

April 20, 1886. HAGARTY, C. J. O.—I think it is reasonably clear on the evidence that Braund was in possession of part of this lot in 1868 or 1869; and certainly not later than the summer of 1872, if not before, he was in possession of the dwelling house abandoned by Anderson, and continued in actual possession thereof down to the sale to Johnston, and after that till the taking possession by the Canada Southern Railway in October, 1884. Thus an actual possession of part for about fourteen years, and of the whole for about twelve years has been shewn. The paper title is in Seale.

I think it is also proved that Braund knew nothing of Seale, as having any interest in the land until the year 1882, when in consequence of certain objections at the Voters' Lists Revision Court, and some information there obtained he heard of Seale being interested, and went to see him.

I think this visit to Seale is proved to have been in September, 1882, and not, as Seale contends, a year or two earlier.

Andrews died about 1875. He held a lease of the lot

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from Seale, dated 23rd of May, 1867, for one year, at \$50 a year. He says Andrews, who was his son-in-law was to look after the property for him as his agent.

Robertson, the assessor, swears that he wrote to Seale about the lot, and the Voters' Lists, in August, 1882. Mrs. Child, a witness, called by Seale, admits that when Braund came to see Seale, she told him Seale had received a letter from Robertson, which had made him anxious, and Braund talked about the election and the Voters' Lists, but she says this was before 1881.

I think we must hold on this evidence and that of Robertson, Braund and his sons, that this interview was really in September, 1882. Braund, the elder, swears it was the 26th September, 1882.

If so, I think there had been then over ten years' actual possession under the statute.

Seale, corroborated by Mrs. Child's evidence, swears that Braund came to him, asked him if he owned this lot, and proposed taking a lease of it from him on the same condition that he had it from Andrews; that is, to keep it in repair and pay the taxes, which he had done; and that it was in 1869 he so agreed; that Seale agreed to this, and to give him a lease for five years on the same terms; he went away but never returned. Braund said people told him that under his possession he could claim title, but he would not do such a thing.

Nothing appears in the whole evidence to shew that Braund knew anything about Seale being the owner or of his knowing any one but Andrews down to 1882.

Seale swears that Andrews had his permission to remove the buildings as he did. This, I presume, refers to the taking away of the doors and windows by Andrews in 1872, spoken of by Braund, and a building that adjoined the stable.

These acts by Andrews seem rather inconsistent with the story told by Seale as to Braund's statement of his bargain with Andrews to pay taxes and keep the place in repair.

Braund wholly denies having so told Seale.

I do not see how, even if we take Seale's statement of these alleged admissions of Braund, how he can thereby defeat the statute.

The full ten years had elapsed. All Braund's dealings were with Andrews, and whatever he said or admitted having agreed to would only apply to such dealings. On this evidence Andrews could apparently have set up title under the statute against Seale, and his having made the alleged agreement with Braund would not interfere with his right so to do.

Andrews, as Seale states, had left the place in 1868 or 1869, and I can see no evidence of anything between him and Seale after the expiration of the year's lease in 1868, except Seale's statement that he took away the buildings in 1872.

I think we cannot, on the evidence before us, hold that the possession and occupation was not sufficient to give title, or that Seale has successfully taken the case out of the statute.

If Andrews, or any one claiming through him, were to recover against Braund, I think we would hesitate long before holding that, on the evidence before us, we could consider the defence under the statute properly met. The most reasonable view of the facts would seem to be that Andrews wholly abandoned the premises in 1868-9, and his coming in 1872 to carry off the doors and windows, &c., would not have amounted to an entry with a view of asserting his possessory rights.

I think the appeal must be dismissed.

BURTON, PATTERSON, and OSLER, JJ.A., concurred.

Appeal dismissed, with costs.

BARBER V. MACPHERSON.

Chattel mortgage—Interpleader—Consideration incorrectly stated—R. S. O. ch. 119, secs. 1 and 6.

It is essential to the validity of a chattel mortgage to secure the mortgagee against the indorsement of any bill or note, &c., under sec. 6 of R. S. O. ch. 119, that it should set forth fully the agreement between the parties and the amount of the liability intended to be created, and that the liability which it professes to secure, should be truly stated.

In November, 1881, the plaintiff indorsed a promissory note for the accommodation of M. for \$550 at three months, and as indemnity against any liability in respect thereof, or of any renewal, took from M. a chattel mortgage which was only renewed once, although the note remained unpaid until the 4th of November, 1882, when \$50 was paid by M. on account, and a new note at six months was given for \$500 in which the plaintiff joined as maker instead of as indorser, and after this note became due and had remained unpaid for six months the plaintiff obtained a second mortgage from M., reciting that he had indorsed a note for \$550, which had not been paid, and that plaintiff was still liable thereon, or on the renewal thereof, and was liable to be called upon at any time to pay the amount, and the plaintiff was called upon to pay and actually did pay the note and interest amounting to about \$590. In an interpleader proceeding at the instance of an execution creditor of M. Held, [affirming the judgment of the County Court] that the mortgage was void as against such creditor.

The distinction between mortgages under the 1st and under the 6th section of the Act, considered and acted on.

The distinction between the two classes of cases provided for by the 6th section, considered.

Kough v. Price, 27 C. P. 309; *Ontario Bank v. Wilcox*, 42 U. C. R. 329, commented on.

AN appeal from the judgment of the County Court of Bruce, in favor of the defendant, in an interpleader issue wherein James Barber was plaintiff, and Henry Macpherson was defendant, and came on for hearing before this Court on the 4th of May, 1886.*

Masson, Q.C., for the appellant.

H. P. O'Connor, for the respondent.

The facts are clearly set forth in the judgments.

June 30, 1886. PATTERSON, J. A.—The facts of this case do not resemble those of any of the reported cases under the statute so closely as to make it quite accurate to say that it is governed by any one of the decisions, yet whatever novelty it presents is rather in the form in which the questions arise than in the questions themselves.

The mortgage recives the indorsement by the mortgagee.

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for the mortgagor of a promissory note for \$550, dated in November, 1881, and due within a year from its date, which shews it to have fallen due a year or thereabouts before this mortgage was given.

If this was the liability to be secured, a formidable objection would arise from the vague way in which the note is referred to, which objection applies with even more force to what the mortgage merely describes as "the renewal thereof." See *Ontario Bank v. Wilcox*, 43 U. C. R. 460, per Wilson, C. J., at p. 488.

The mortgage does not profess to be given to secure the mortgagee against the original indorsement. It does not even assert that he is liable as indorser upon that note. It cautiously recites that he is liable on the note *or on the renewal thereof*, and consistently adheres to that form of expression. It recites an agreement to give the security against the payment of the said promissory note or any part thereof, *or any note of renewal thereof*; and so in the proviso and covenant for payment, which extend also to any future notes which the mortgagee may indorse for the accommodation of the mortgagor.

It is shewn by the evidence, and is in terms admitted by both mortgagee and mortgagor, that the recited note had been renewed by a joint and several note for \$500, made by them on the 4th November, 1882, payable six months after date, which renewal note was overdue when the mortgage was made, and which the mortgagee was afterwards sued upon and compelled to pay.

The question is, whether the learned Judge of the County Court was wrong in holding that the mortgage was invalid as against the execution creditor of the mortgagor.

The statute, R. S. O. ch. 119, which in its terms applies to all mortgages of chattels which remain in the possession of the mortgagor, refers specially to three classes of cases.

The first is the simple case of a debt due from the mortgagor to the mortgagee. This was the only case which seemed to be contemplated by the original Act of 1849, 12 Vict. ch. 74, under which the cases of *Baldwin v. Benjamin*,

16 U. C. R. 52; and *Brodie v. Ruttan*, 16 U. C. R. 207 arose.

Then when the statute took its present shape in 1857, by 20 Vict. ch. 3, the other two cases were dealt with by the third section, which is now section 6 of R. S. O. ch. 119, and which from its peculiar drafting has always created some embarrassment.

It was commented on by Harrison, C. J., in *O'Donohoe v. Wilson*, 42 U. C. R. 329, where he pointed out that one of its peculiarities in all probability arose from the introduction, during the passage of the bill, of the reference to indorsing notes or giving other security, without carefully fitting that amendment to the clause as originally drafted.

The first of these two cases is, that of future advances to be made upon an agreement in writing for the purpose of enabling the mortgagor to enter into and carry on business with such advances, the time of payment of such advances not being longer than one year from the making of the agreement and mortgage.

The object and importance of provision for transactions of this class is manifest. Advances actually made might of course be secured as debts under the earlier clause. This new clause enabled the mortgage to be effectually given before the money was actually advanced; and its operation did not, as I understand it, extend merely to preserve the priority of advances made before the issue of an execution or attachment against the mortgagor, or the making of a subsequent sale or mortgage, but gave the same priority to all advances made in terms of the written agreement, and falling due within the year. It was therefore important that the extent of the liability intended to be created should distinctly appear.

The other case is the indorsement of any bills or promissory notes, or any other liability entered into for the mortgagor, not extending for a longer period than one year from the date of the mortgage.

There is nothing said of an agreement to indorse or to assume in the future any liability for the mortgagor. This

does not suggest, to my mind, any doubt of the validity of a mortgage to secure renewals, made after the mortgage and falling due within the year, of the note indorsed at or before the making of the mortgage, and in respect of which the mortgage is made. Such renewals may merely continue the original liability. That liability and its extent are ascertained by the indorsement or undertaking in respect of which the mortgage is made.

I entirely agree with the decision in *O'Donohoe v. Wilson*, that the requirements of section 6, as to setting out an agreement, apply only to mortgages to secure future advances for the purposes described, and do not touch mortgages to secure against liabilities incurred by indorsing or in any other way. This view is quite in consonance with the principle and objects of the section as I gather them from the statute itself.

A liability as surety for an overdue debt is within the terms of the section, the phrase "not extending for a longer period than one year" evidently pointing to the principal debt being payable within that time, as it is when it is already due.

I regret that I cannot see my way to support the plaintiff's mortgage, for it seems a hardship on him to lose his security for the money he has been obliged to pay in discharge of a liability that existed at the date of the mortgage for a debt then overdue.

Unfortunately that is not the liability which the mortgage professes to secure, though it may have been for one and the same debt.

The actual liability was on a joint and several note. It was upon that note that the plaintiff was sued and compelled to pay the money. It would not, if other objections were out of the way, come within the terms of the deed which professes to secure only such renewals or other notes as the plaintiff should *indorse* or had *indorsed*—"The said promissory note or renewal thereof so as aforesaid indorsed by the said mortgagee," are the words used in the proviso; and the affidavit of bona fides speaks only of "such pro-

missory note liability for the said mortgagor as therein set out.

The execution creditor would certainly fail to find any such liability, existing or satisfied since the mortgage, as the mortgage itself describes.

I think therefore, without entering further into the questions under the statute, that our only course is, to dismiss the appeal.

OSLER, J. A.—This is an appeal from the judgment of the County Court of the County of Bruce, in favor of the defendant, on the trial of an interpleader issue. The plaintiff claimed under a chattel mortgage from the execution debtor, one Manley, and the evidence disclosed the following facts :

In the month of November, 1881, the plaintiff indorsed Manley's promissory note for \$550, at three months, in favor of one Bell.

To secure himself against his liability on that indorsement, he took a chattel mortgage on the property in question, dated the 7th November, 1881, which though renewed once was not renewed again and ceased to be an available security.

On the 4th November, 1882, the note being then overdue, and \$50 only having been paid thereon, another note was given by way of renewal or extension, payable six months after date for \$500. Instead of indorsing the latter the plaintiff signed it as joint maker with Manley, and on the 10th November, 1883, when it was six months overdue and unpaid, the mortgage now in question was taken.

This mortgage recites that in November, 1881, the mortgagee indorsed the promissory note of the mortgagor for \$550, for the accommodation of the latter " which note was payable within one year but has not been paid, and the mortgagee is still liable thereon, or on the renewal thereof, and is liable to be called upon to pay the same at any time, and the mortgagor has agreed to indemnify him from

payment thereof by these presents." Then there is a repetition of part of the last recital "that the mortgagor has agreed to enter into these presents for the purpose of indemnifying and saving harmless, the mortgagee from payment of the said promissory note, or any note of renewal thereof."

The proviso is that if the mortgagor shall pay said note or renewal thereof, so as aforesaid indorsed by him, and shall pay every other note or renewal thereof which may hereafter be indorsed by way of renewal of the note in the recital set forth, and indemnify and save harmless the mortgagee from all loss in respect of said note or renewal thereof or renewals, then the mortgage shall be void.

Then follows a covenant by the mortgagor to pay said note, or renewal thereof in the recital and proviso mentioned, and all future and other notes which the mortgagee shall thereafter indorse for the accommodation of the mortgagor "by way of renewal of said note in said recital set forth."

There is also a power of entry, seizure and sale in case of default in payment of the said note or renewal thereof, or any future note "as in the proviso mentioned."

The affidavit of the mortgagee states that the mortgage truly sets forth the agreement entered into between himself and the mortgagor, and truly states the extent of the liability intended to be created by such agreement and covered by the mortgage: that the mortgage was executed in good faith for the express purpose of securing him against payment of the amount of "such promissory note liability" for the mortgagor, as therein set forth, &c.

The question is whether this mortgage, which was duly registered, and in respect of which there is no imputation of fraud or bad faith of any kind, can be upheld under the sixth section of the Chattel Mortgage Act. The objections taken to it are: 1. That it does not shew that the time for payment of the liability undertaken for the mortgagor might not extend beyond the period of one year from its date, and that a renewal for a longer

period was contemplated or at least within the agreement.

2. That the terms, nature, and effect of the agreement between the parties are not fully set forth by recital or otherwise, because the amount and nature of the liability are not truly stated, the extent of the latter being only \$500 at the date of the mortgage, and instead of being incurred by indorsement is by the joint note of the principal and surety.

The learned Judge held the mortgage defective on the first ground, but the second appears to me to be the more serious of the two. The 6th section of the Chattel Mortgage Act provides for two distinct cases—the first that of an agreement in writing for future advances and a mortgage to secure the repayment of such advances, the time of such repayment not being longer than one year from the date of the agreement; and the second that of a mortgage to secure the mortgagee against the indorsement of any bills or notes or other liability incurred by him for the mortgagor, not extending for a longer period than one year from the date of the mortgage.

It has, I think, been uniformly held that in both these cases the mortgage must set forth fully by recital or otherwise the terms, nature and effect of the agreement, and the amount of the liability intended to be created; and further, that the mortgagee's affidavit must state that the mortgage truly states the extent of the liability intended to be created by the agreement, and covered by the mortgage: *Turner v. Mills*, 11 C.P. 368; *Kough v. Price*, 27 C.P. 309; *Fraser v. Bank of Toronto*, 19 U. C. R. 381; *Ontario Bank v. Wilcox*, 43 U. C. R. 460; *Driscoll v. Green*, 8 A. R. 366, may be referred to.

In *O'Donohoe v. Wilson*, 42 U. C. R. 329, Harrison, C. J., for the first time pointed out the different character of these two classes of cases, and that it was not clear that in the case of a mortgage to secure an existing indorsement or liability any recital of a pre-existing agreement was necessary in the mortgage or required in the affidavit.

The point is referred to in the subsequent case of *Dris-*

coll v. Green, 8 A. R. 366, in which *O'Donohoe v. Wilson*, 42 U. C. R. 229, is not noticed, but it appears to be assumed and affirmed that the requirements of the section apply indifferently to both kinds of mortgage.

I do not feel at liberty to urge, as I should if the point was *res integra*, that a different construction from that which has hitherto prevailed, and which was approved of or followed in *Driscoll v. Green*, ought now to be adopted. A mortgage to secure against an endorsement or other liability incurred by the mortgagee for the mortgagor, must set forth fully the agreement between the parties whether verbal or in writing, and the amount of the liability intended to be created, and the affidavit of the mortgagee must, among other things, state that the mortgage truly sets forth the agreement, and truly states the extent of the liability, &c. With every desire to uphold the instrument in the present case I think it is impossible to say that it is in accordance with the Act, as the courts have interpreted it. The note described therein is a note for \$550, which appears from the evidence to have borne interest at 8 per cent. The plaintiff may have remained liable upon his indorsement of that note, but when the mortgage was taken it had been reduced to \$500, and for this sum another note, a joint note of the principal and surety had been taken, bearing interest at 10 per cent.

If the liability on the latter was that to secure which the mortgage was taken, it is not set forth or described therein at all further than as it may be referred to as the renewal of the note of \$550. And if the liability on the \$550 note was intended, the amount is not stated, it being no longer \$550 but \$500 only. Moreover, the terms of the liability in respect of the two notes are different as to the rate of interest borne by each.

The distinction between the 1st and 6th sections of the Act in this respect has been more than once alluded to. (*Beecher v. Austin*, 21 C. P. 334, 343; *Hamilton v. Harrison*, 46 U. C. R. 127, 131). The former says nothing about the consideration for the instrument being set forth

therein, and it has accordingly been held as in *Hamilton v. Harrison*, *Tidey v. Craib*, 4 O. R. 696, and *Parkes v. St. George*, 10 A. R. 496, that an erroneous statement of the consideration in an instrument coming under that section is not per se sufficient to avoid it where the affidavits required by the Act have been made, and that it is merely a circumstance to be considered in deciding the issue of fraud or no fraud. *Beecher v. Austin*, 21 C. P. 338. But under the 6th sec. the amount of the liability is expressly required to be stated in the mortgage, and therefore unless it is so stated the instrument fails to comply with one of the very conditions required for its validity, the language of the section being "In case * * the mortgage sets forth * * the amount of the liability * * and is registered it shall be valid." Looking then at the requirements of the affidavit, I think this means the "true" amount of the liability, just as cases under the Imperial Bills of Sale Act, it is held that the "consideration" which the Act requires to be stated in the bill of sale means the "true" consideration. *Hamilton v. Chaine*, 7 Q. B. D. 1, 319.

In *Parkes v. St. George*, 10 A. R. 496, the mortgage was under the first section and the affidavit was in the usual form. The larger part of the consideration consisted of a past due debt, and two members of this Court held that as to it the mortgage was not invalidated by the fact that the residue was for an advance which had been verbally agreed to be made, but which had not actually been made at the date of the mortgage. Here there is nothing to which the instrument can apply but to a consideration for which it might have, but has not, been validly given.

I do not think there is much force in the other objection. I agree rather with the view indicated by Mr. Justice Burton in *Driscoll v. Green*, 8 A. R. 366, than with the dicta in *Kough v. Price*, 27 C. P., and *Ontario Bank v. Wilcox*, 43 U. C. R., on this point. The liability for which the mortgage was given was, as the recital shews, already due, and therefore was one, within the words of the Act, not

extending beyond a year from the date of the mortgage. I am unable to comprehend how a reference to a possible future renewal, which had not been agreed for, and which the parties were not bound to make, can invalidate a security in other respects sufficient. I think that all that can be said of it is, that as to any renewal which extended beyond the year, the mortgage would not cover it.

BURTON, J. A.—I agree in the view that this appeal should be dismissed for the reasons stated by my brother Oaler.

I am also inclined to take the same view of the construction to be placed upon the 6th section as he does, and thought I had so expressed myself in *Driscoll v. Green*, where I refer to it as applying to two distinct classes of cases.

One, having reference to future advances as to which an agreement in writing was required to be entered into and set forth in the mortgage.

The other, having reference to a mortgage to secure the mortgagee against indorsements or other liabilities incurred by him for the mortgagor, as to which I have always thought no agreement in writing was necessary.

In that case, whether necessary or not, such an agreement had been made, and the mortgage recited it, so that it became unnecessary to decide the question of whether such an agreement was or was not necessary in cases coming within the latter branch of that section, but I expressed myself as I did in *Driscoll v. Green* for the purpose of guarding against being supposed to acquiesce in the views entertained by some Judges in the decisions to which my brother refers, that an agreement in writing was required in both cases, and I now again refer to it, so that as far as I am concerned I may not be supposed to have committed myself to such a construction of the section.

HAGARTY, C. J. O., concurred.

Appeal dismissed, with costs.

STEVENS V. BARFOOT.

Fixtures—Mortgage of realty—Chattel mortgage on machinery.

O. & K. under a verbal agreement with an agent of the Canada Company (which that company refused to adopt) entered into possession of land belonging to the latter, and erected a steam mill thereon. They procured from the plaintiffs an engine, boiler, &c., under an agreement that the property therein should not pass to the vendees till paid for. They exchanged the plaintiffs' boiler for another made by one D., which they put up with the plaintiffs' engine. This coming to the knowledge of the plaintiffs they seized their own boiler, in consequence of which O. & K. on the 27th of November, 1883, executed to the plaintiffs a chattel mortgage on the "D" boiler.

Prior to this date, however, and on the 12th of the same month O. & K. executed a mortgage on the said lands and premises to the defendant, to whom they were indebted, and three days later as a matter of precaution and as part of the same bargain they executed a chattel mortgage in his favor as further security for a debt due him (not naming any amount), and assigned all and singular certain goods, &c., viz.: "One mill and machinery, one frame house * * two bay horses." &c.

This security by reason of defects under the Chattel Mortgage Act was void as against the plaintiffs claim. Prior to the commencement of this action the defendant obtained from the Canada Company a deed of the land in question. On appeal to this Court it was

Held [in this reversing the judgment of the Court below], that although O. & K. had not any interest in the land on which they had so erected their mill, and placed their machinery, yet by their mortgage the "D." boiler and other fixtures not originally purchased from the plaintiffs, passed to the defendant, as part of the realty; such mortgage unlike that of the chattels not requiring registration to give it validity.

Held, also, that the defendant might support his title under the deed from the Canada Company; the boiler having been affixed to the land and passing under the deed as part of the realty.

Per PATTERSON, J. A.—No difficulty existed in supporting the defendant's title under either of his own mortgages, or under the conveyance from the Canada Company.

THIS was an appeal by the defendant from the judgment of Cameron, C. J., reported 9 O. R. 692, and came on to be heard before this Court on the 11th and 12th of March, 1886.*

Moss, Q. C., and *Wilson*, for the appellant.

Magee, for the respondents.

April 21, 1886. HAGARTY, C. J. O.—I fully agree with the learned Chief Justice that the chattel mortgage given by Overton & Kennedy to defendant, 15th November, 1883, is bad as against the plaintiffs' subsequent mortgage of

* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A

November 27, 1883, for the defects under the Chattel Mortgage Act as pointed out in the judgment below.

The defendant then relies on his mortgage of the lot itself.

The facts of the case are peculiar; Overton & Kennedy under an alleged agreement with an agent of the Canada Company entered upon that lot as intending purchasers. The company repudiated the alleged bargain, and Overton & Kennedy never had any title. This was in the spring or summer of 1883; they put up their steam saw mill; they had contracted with the plaintiffs for engine and boiler, and had obtained the same under bargain that the property was not to pass to them till paid for. They exchanged the plaintiffs' boiler for a boiler made by Doty, and put the latter with the plaintiffs' engine, &c., on the Tilbury lot (the Canada Company's.) The plaintiffs heard of this and required security on the Doty boiler, and on November 27, 1883, Overton & Kennedy gave the plaintiffs the chattel mortgage on the boiler subject to defeasance on payment of \$500 in one year from date, and also to be collateral security for two notes held by the plaintiffs payable respectively, January 1st, 1884, and January 1st, 1885. The mortgagors to have possession till default; usual printed covenants as to mortgagors selling or parting from possession, &c.

On the preceding 12th November, less than a fortnight before, Overton & Kennedy being indebted to the defendant, executed a mortgage to him of this land covenanting to have title thereto in fee simple, describing it as the south half of lot 16, 8th concession Tilbury, under the Statutory Short Form Act. Defeasance on payment of existing debt and all further advances. No day fixed for repayment.

It was agreed at the same time to give a mortgage on the chattel property to the defendant as further security, but the latter was not executed till three days after, viz: 15th November, 1883. It recites a debt due to the defendant (amount not specified) and assigns.

"All and singular the goods, chattels hereinafter particu-

larly mentioned and described as follows: one mill, and machinery; one frame house, twenty feet by twenty-eight feet, and kitchen thereto annexed, twenty-four feet by sixteen feet, one storey and a half high, and brick chimneys; one frame stable, forty feet by twenty feet, fifteen feet high; two bay horses; one bay horse; one roan horse; one wagon, made by Smith & Currier, Chatham; two pair trucks, made by Dalton & Thompson; one cart, made by Thompson; three sets of double harness, and set new tools; chains, hooks, and tanks; all which said goods and chattels are now lying and being on the premises situate on the south half of lot No. 16, in the 8th concession of the said township of Tilbury West.

To have and to hold all and singular the said goods and chattels unto the mortgagee, his executors, administrators and assigns to the only proper use and behoof of the mortgagee, his executors, administrators or assigns forever."

As already stated this mortgage cannot be upheld as against the plaintiff for the objections stated by the learned Chief Justice under the Chattel Mortgage Act.

The question to be determined is as to the effect of these two mortgages.

The law is, I think, reasonably clear that on a mortgage simply of the land all such fixtures as are in question before us will pass to the mortgagee, such cases as *Climie v. Wood*, L. R. 4 Ex. 328, in error, as further explained by Blackburn, J., in *Holland v. Hodgson*, L. R. 7 C. P. 337; they pass "not as fixtures but as part of the land, and the deed of transfer does not require registration as a bill of sale." The subject is much discussed in *Amos & Fer*, 293, ed., 1883. It is pointed out that if a contrary intention can be collected from the mortgage deed itself they will not so pass, referring to such cases as *Hine v. Horton*, 5 B. & Ad. 715.

The other authorities are there collected. In the case before us the agreement between the parties was first there should be the mortgage of the realty and as part of the same bargain there should be also a separate mortgage of the fixtures.

At p. 34, Overton states that it was all one transaction

that they would both be given, and the difference of dates was owing to the fact that they were not both ready for execution.

The defendant says (p. 68) that he wanted to get all the security he could. "I took this chattel mortgage having the mill and machinery in it as a precautionary measure. I thought I would have two sort of titles." He said he had some difficulty in a previous matter, as to the effect of a mere realty mortgage, and he therefore took this chattel mortgage: that there was just the possibility of trouble, and he did not know which way to look at it, and wanted all the security he could get.

It seems clear that the mortgagors intended to give, and he intended to get security on both realty and personalty.

We have not been referred to any case in which two separate mortgages were taken as here.

A case of *Whitmore v. Empson*, 23 Beav. 313, is noticed in *Amos & Fer*, 312, 313. There the bankrupt mortgaged the realty to one person, and the fixtures separately to another some time after, but it was held not to be a constructive severance so as to make them goods and chattels in the order and disposition of the bankrupt in his possession at the bankruptcy.

Apart from any question as to the mortgagors having no title to the land, it seems to me that we cannot hold that the defendant loses the legal benefit of the realty mortgage of 12th November, by taking the chattel mortgage three days later, under the circumstances of the case.

A different question would have arisen if the owner of the freehold had mortgaged the fixtures before creating any incumbrance on the realty.

Then as to the mortgagors' title to the land. They had entered and made their improvements thinking they were authorized so to do by the action of the company's timber agent. In fact they were in law simply trespassers. If they had annexed the chattel property of another person to the freehold I do not think that person would be precluded from reclaiming it if it could be severed without

substantial damage to the freehold. We had occasion to notice a state of facts bearing on this question in *The Hall Manufacturing Co. v. Hazlitt*, 11 A. R. 749.

But if a man annex his own chattels to the land of another on which he has trespassed, or to which he has no title, or ceases to have title by forfeiture, or some default of his own, it seems that he is not entitled to remove such fixtures.

The subject is discussed in *Ewell on Fixtures* 272-3, 1876, *ib.* 41; *Hurbschman v. McHenry*, 29 Wis. 656, 1872, very fully supports this view; *Hinckley Iron Co. v. Black*, 39 Am. Rep. 350, 1880, Supreme Court of Maine is also very clear. Many cases are cited and extracts given from text writers, *Ewell on Torts*; *Washburn on Real Property*, &c.; *Cooley on Torts*, 1879, ch. 15, on Wrongs to Personal Property, p. 427 *et seq.* At p. 429 the case of a trespasser annexing chattels to the land of another is treated, of, and at 430 the annexing of the property of another without his consent.

The foregoing case of *Hinckley Co. v. Black*, is noticed in *Amos & Fer.* 280.

It would seem from this that as against the Canada Company, the true owner, the plaintiffs could not claim under this bill of sale, the articles affixed to the freehold which belonged to Overton & Kennedy. The Canada Company prior to this suit had conveyed the land to the defendant. As between him and Overton & Kennedy the latter re-mortgaged the realty to him as owners in fee, and no other interest can now be set up against his claim.

I think as to the boiler and other articles the subject of this discussion, we must allow the appeal.

BURTON, J. A.—The judgment of the learned Chief Justice who tried this case so far as regards the articles comprised in the sale notes to Overton & Kennedy is not complained of, the question before us on appeal is confined to the boiler purchased by them from Doty, and certain articles of machinery not purchased from the plaintiffs,

but substituted for, or in addition to certain portions of the machinery which was originally purchased from them.

As to the boiler, the judgment of the learned Chief Justice proceeds apparently entirely upon the ground that the defendant's chattel mortgage though prior in point of date and registration to that of the plaintiffs was void, as against the plaintiffs, in consequence of its non-conformity with the requirements of the Chattel Mortgage Act, and if in our opinion the defendant's title depended entirely upon his chattel mortgage we should agree with him on that point, but the learned Judge has omitted to deal with the defendant's claim under the mortgage to him of the land.

If the mortgagors had possessed as they supposed they did an equitable title to the freehold, and had given this mortgage to the defendant, the boiler would have passed with the conveyance, because upon the mortgage in fee it is to be deemed part of the land, there being nothing on the face of the mortgage to shew that it was not intended to pass, and as between these parties the result must be the same, although the mortgagors had no interest in the land beyond the mere possession. But it is said that by giving a chattel mortgage three days subsequently, the boiler lost the property of affinity and incorporation with the freehold, which it previously possessed from its position, and had become changed into a chattel of a different description, and partook of the character of those fixtures which are separated from the freehold in fact as well as in law. I do not entertain a doubt that the mortgagors having still an estate in the land, and in the fixtures, might as against any one except their prior mortgagee execute such a deed as would alter the character of the property, and impart to fixtures which had previously to that act been part of the realty—even while still attached to the freehold—the character and quality of chattels movable so as to let in execution creditors and subsequent purchasers or mortgagees, as against the mortgagors themselves, and the holder of such deed if invalid under the Chattel Mortgage Act; and I can quite understand that if the mortgagors had, as they had a

perfect right to do, created a primary charge on the boiler, treating it as a chattel, and afterwards created a secondary charge by the same instrument on the land and the machinery and fixtures upon it there would have been a clear indication of intention to treat the property as a chattel; but I am unable to appreciate the force of the contention that a mortgage, the effect of which is to pass the boiler as part of the realty is to be cut down or restricted in its operation by a subsequent instrument which treats it as a chattel.

It could only be upon the ground that in this case the mortgagee under the second instrument is the same party who took the mortgage on the land, and as an admission therefore that he treated the other mortgage as a conveyance of the land alone, and possibly in the absence of all explanation this might be regarded as an indication of the intention of both parties to that instrument, so to treat it; but the evidence here is that it was intended that the mortgage on the land should pass the things affixed to the land, and that the second instrument was taken as a precautionary measure, so that if the boiler did not pass as it was the intention of the parties it should pass under the mortgage of the realty, it should be covered as personalty. Under such circumstances it seems difficult to see how the defendant's position was prejudiced by accepting the second mortgage.

But I think that the defendant has succeeded in establishing a title under his deed from the Canada Company. There can be no question that when the boiler was incorporated with the soil, it was the intention of its owner that it should be so incorporated; the only question is, whether that having been done under a mistake can make any difference. It seems to be assumed in Mr. Ewell's work, (p. 59) that that itself makes no difference if the annexation was made without the consent of the owner of the land. It is true that the mere circumstance of the chattel being annexed to the land does not necessarily lead to the inference that it cannot be removed. It

is always a fit subject of enquiry how it came to be placed where it was, and what was intended to be its use. We know in this case that it was intended by the owner of the chattel to incorporate it with the soil and to make it part of the realty, and that it was not done under any arrangement with the owner of the soil, so there is nothing to rebut the ordinary presumption, except that the owner was under the mistaken belief that he was entitled to the land; that was his misfortune; he was deceived by a person who pretended he had authority to sell, but the proprietors of the land cannot be affected by that man's fraud.

Neither do I think it a case coming within the meaning of the R. S. O. ch. 95, sec. 4, giving a lien for the amount by which the value of land is enhanced by improvements made by a person under the belief that the land is his own.

The evidence does not appear to sustain the plaintiffs' contention that the land was acquired from the Canada Company in virtue of his position of mortgagee of Overton & Kennedy.

As to the remaining articles (other than those which consisted of mere repairs to the machinery, and incorporated with it therefore as part and parcel of it), the plaintiffs have established no title to them; they were not purchased from them, and were not comprised in their chattel mortgage. As to these, therefore, and the boiler, the judgment of the learned Judge cannot I think be sustained and should be reversed.

PATTERSON, J. A.—Certain machinery, forming part of the equipment of the saw mill erected by Overton & Kennedy on lot 16 in the 9th concession of Tilbury west, was supplied to Overton & Kennedy by the plaintiffs on the terms that it should remain the property of the plaintiffs till paid for. That machinery, although affixed to the freehold, remains the chattel property of the plaintiffs: *Hall Manufacturing Co. v. Hazlitt*, 11 A. R. 749. A boiler which was bought from Doty was also affixed to the freehold in connection with the saw mill. The only title to it

which the plaintiffs can advance is under a chattel mortgage made by Overton & Kennedy on the 27th of November, 1883, some months after the affixing of the boiler had taken place; and there are some other pieces of apparatus forming part of the equipment of the mill, and affixed to the freehold, to which the plaintiffs make no title.

The only question between the plaintiffs and the defendant is, about the boiler. After it was affixed to the land Overton & Kennedy made a mortgage of the land to the defendant. But it happened that the land belonged to the Canada Company, and that company conveyed it to the defendant.

Why should not the defendant be held to take the boiler, and also the other fixtures to which the plaintiffs have no pretence of title, as part of the land?

If nothing had been done except the making of the mortgage of the land to the defendant, and the subsequent chattel mortgage to the plaintiffs there would be no room for argument. I do not attempt to prove this proposition by citation of authorities, because I could not add anything of consequence to what I said in *Keefer v. Merrill*, 6 A. R. 121.

But something else was done; Overton & Kennedy made a chattel mortgage to the defendant upon the mill and machinery, along with horses, tools and other chattels, before they made the mortgage of the boiler to the plaintiffs. The evidence is, that this chattel mortgage, though not executed for two or three days after the mortgage of the lot, was really part of the same transaction, and was taken, as far as the fixtures were concerned, as a matter of precaution, because the defendant had been once advised that some fixtures did not pass by a mortgage of the realty to which they were affixed.

It happens that the defendant cannot avail himself of his chattel mortgage, as a conveyance of the boiler as a chattel, as against the plaintiffs, because of insufficient compliance with R. S. O. ch. 119; but the plaintiffs seek to avail themselves of it against the defendant, by using it as evidence

that there was a severance in law of the boiler from the freehold by its being thus dealt with between Overton & Kennedy and the defendant, just as there afterwards was, as far as they could do it, between Overton & Kennedy and the plaintiffs; *ergo*, the boiler must be regarded as always a chattel, and the property of the plaintiffs as against the defendant.

What we are asked to do is to draw the inference of fact that in the dealings between Overton & Kennedy and the defendant it was agreed to treat the boiler as a chattel, and not as part of the realty.

We have, as I read it, very clear evidence of the intention of those parties in their dealings in the matter.

That intention was, that the defendant should have all the machinery, including the boiler, as security for his debt

To infer the intent for which the plaintiffs contend, would be, in my judgment, to strain the evidence and to substitute an inference, technical and unreal in its character, for conviction founded on belief of the evidence.

I do not think the inference could be supported by any reasonable treatment of the evidence; but, apart from that, we ought not to be astute to find reasons for defeating what we cannot but see was the actual intent of the parties, but should recognise the mortgage of the realty and the Canada Company's deed as having their direct legal operation, which carries the actual intent into effect.

This position, namely, the operation of the mortgage of the lot and of the Canada Company's deed, does not seem to have been much considered by the learned Chief Justice in the Court below, although he alludes to it as taken for the defendant. His judgment I understand to turn on the invalidity of the defendant's chattel mortgage under R. S. O. ch. 119, and I entirely concur in his views on that topic. I think, however, that on the other ground the defendant must succeed.

It should also be borne in mind that assuming, as we are in my opinion bound to assume, that the boiler was made a part of the realty when it was first affixed to it, the

LEADLAY V. McROBERTS.

Sale and purchase of goods—Statute of Frauds, sec. 17—Variation of bargain before breach—Acceptance of part—Purchase by sample.

The defendant a manufacturer of woollen goods in company with W., his manager went to the warehouse of the plaintiffs for the purpose of purchasing wool, where he was shewn a quantity consisting of about 200 sacks of white wool which plaintiffs offered to sell at 24c. a pound for the lot. The defendant, after examining as much of the wool as he desired, ordered ten sacks thereof to be shipped to him immediately with the view of trying it, that is to see if it would produce the quality of goods he dealt in. On the following morning the defendant saw the plaintiff L., personally and informed him that he would take the lot; and the plaintiffs agreed to carry it for him on certain terms, and on that day the ten sacks were shipped to the defendant. At the same time an invoice was sent containing the memorandum: "Terms, interest at seven per cent., from 1st February," being the terms offered to defendant if he would take the lot. The ten sacks were subsequently received at the defendant's mill and were worked up there.

Held, [reversing the judgment at the trial and of the Divisional Court] that the agreement to take the lot made before the performance of the first bargain was a variation of or substitution for the first bargain and that the delivery of the sacks was a delivery and such an actual receipt and acceptance of part of the goods purchased as satisfied the requirements of the 17th Section of the Statute of Frauds, and that the plaintiffs were entitled to recover the price of the remaining 190 sacks together with interest from the date mentioned.

THIS was an appeal from a judgment of the Common Pleas Division in a action brought by Edward Leadlay and Thomas Hook against A. McRoberts and B. Williams to recover the price of certain wools alleged to have been sold by the plaintiffs to the defendants.

The action was tried without a jury at the Winter Assizes in Toronto, on the 20th of January, 1885, before Galt, J., who on the 7th of February gave judgment for the defendants; and a motion made to the Divisional Court to set such judgment aside and enter judgment for the plaintiffs was refused, and the action dismissed, with costs.

The plaintiffs thereupon appealed to this Court and the same came on for hearing on the 1st day of March, 1886.*

Robinson, Q.C., and McMichael, Q.C., for the appellants.

* *Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

J. H. MacDonald, Q.C., and J. J. MacLaren, for the respondents.

The facts are clearly stated in the judgment of Patterson, J. A.

April 20, 1886. PATTERSON, J. A.—The plaintiffs bring their action to recover the price of wool sold to the defendant.

The action was brought against the defendants McRoberts and Williams under the impression that they were partners in the business carried on under the firm of the Glen Woollen Mills Company, but it appeared that McRoberts alone constituted the so called company, Williams being manager at a salary, and with a large interest in the profits, but not being a partner.

The plaintiffs do not now object to the judgment dismissing the action as against Williams. We have therefore to consider only the questions touching the contract, without reference to the nature of the relations between the original defendants, and as if McRoberts had been the sole defendant. I shall accordingly speak of him simply as the defendant.

The parties are at variance respecting the exact nature of the contract, which makes it necessary to examine the evidence; but, as the Statute of Frauds is relied on for the defence, my examination will in the first place have more particular reference to that branch of the case.

The defendant carries on the business of spinning wool and manufacturing certain kinds of woollen goods.

The plaintiffs are dealers in wool at Toronto.

On the 23rd of January, 1884, the defendant and Williams his manager were in Toronto for the purpose of buying wool.

The plaintiffs had then in their warehouse upwards of 200 sacks of white wool, and about 26 sacks of black wool,

The defendant bargained with the plaintiff Leadlay who asked 25 cents a pound for the white wool, and 22 cents for the black.

The white wool was piled on the ground floor of the warehouse, and was examined by the defendant or his manager, as many sacks as they wished to have opened being ripped open to enable them to inspect the wool.

The plaintiff Leadlay offered to take 24 cents a pound for the white and 21½ cents for the black, if the defendant would take the whole, the plaintiff also agreeing to the request of the defendant, in the event of the whole being taken, to carry it and let the defendant take it as required, charging him seven per cent. interest from the first of February.

The agreement having proceeded thus far, the defendant said he would take ten sacks of the white and ten of the black, which were to be "shipped" at once by railway, for the purpose of trying the wool.

I state these facts, omitting for the present some details to which I may possibly have to refer farther on, as facts which all parties agree upon in their evidence.

The next material fact is stated in the same way by all parties who speak of it. That is, that on the same day, the 23rd of January, the defendant, after conference with Williams, decided to take the whole lot of white wool, and the next morning the defendant told the plaintiff that he would take the lot. The defendant's statement, as reported at one part of his evidence is, "I came back the same day and Leadlay was out, I think. Then I came back the next morning and told him we would take the lot of white wool."

I do not think he used the words "white wool." I think he shews himself that he only said "the lot," and it is very plain that the plaintiff understood, and very naturally understood, that both black wool and white wool were meant. But the defendant says he intended only the white, and not the black which was up-stairs, and which he had not seen and did not require to see because it is a well understood grade of wool; and that he simply *bought* the ten sacks of black. The black wool, however, is not in question before us, for the price of the ten sacks

has been paid into Court, and the plaintiffs do not press their claim for the rest of that wool. For our immediate purpose, therefore, I state the fact, that on the 23rd of January the defendant decided to take all the white, and on the morning of the 24th told the plaintiffs so.

The 20 sacks were shipped on the 24th. There is an expression in the evidence of Mr Blake, the plaintiff's foreman, which might imply that he shipped them on the 23rd. He said: "I went to work at once and had the 20 sacks reweighed and marked, and ordered a team and shipped them at once," but when he gives the date he is clear that it was the day following the bargain, viz, the 24th, and he is borne out by the invoice, which is dated the 24th, and which, moreover, contains a very important note, which by an oversight has been omitted in printing the copy in the appeal book, "Terms: interest at 7 per cent. from 1st February." The prices charged are 24 and 21½ cents. These terms and prices, being those only offered when "the lot" was to be taken, make it clear that the invoice must have been prepared after the defendant had agreed to take the lot.

But whether the twenty sacks had or had not left the plaintiffs' warehouse when the bargain for the lot was closed, there is no pretence that they reached the mill or were "accepted and actually received" by the defendant for some days later.

I may here say, though it rather belongs to the questions to be discussed after the Statute of Frauds has been got rid of, that my own belief from the evidence, the details of which I do not now stop to notice, is that when the defendant spoke of taking the ten sacks of white wool to try them, the object was not to ascertain what grade or quality of wool it was, for Williams, whose skill was relied on by the defendant, had satisfied himself about that. Whether or not his examination had been sufficiently thorough, and whether or not he was mistaken about the quality, he thought he knew what it was, and the trial they proposed was to ascertain if that wool would produce

the particular classes of goods in which they dealt. That, I believe, was the test which they decided to forego in order to secure the whole of the wool on what they then considered favorable terms.

There was no acceptance of the wool by the defendant until it reached his mill.

If his order was for ten sacks out of a pile of two hundred, the appropriation of ten sacks by the vendor, and delivery of them to the carrier, might in some circumstances amount to a receipt by the vendee, but could not be held to be an acceptance. In the words of Martin, B., in *Hunt v. Hecht*, 8 Ex. 814, "An acceptance, to satisfy the statute, must be something more than a mere receipt; it means some act done, after the vendee has exercised, or had the means of exercising his right of rejection."

See many other cases commented on, along with *Hunt v. Hecht*, in *Benjamin on Sales*, and see *Page v. Morgan*, 15 Q. B. D. 228.

But when the wool was received and worked up in the mill it was unquestionably "accepted and actually received." That acceptance and receipt lets in evidence of the contract on which it was accepted and received, and it is clear that the only contract then existing was a contract to buy at the reduced price, and on the agreed terms as to carrying it at seven per cent, the whole lot of wool of which the ten sacks formed part.

As far as the bare question of acceptance and actual receipt is concerned, it does not strike me as of any consequence whether the wool had gone to the railway station before the defendant announced his decision to take the whole or was still in the plaintiffs' warehouse, though I think the latter was the case; but I regard as of some importance the fact that the defendant's decision had been come to, and that he made an attempt to announce it to the plaintiffs, as he tells us he did, on the 23rd, when the wool was certainly still in the warehouse, because it demonstrates that the ten sacks no longer formed in his mind the subject of a separate transaction, but that "the lot"

was understood by him to include the ten, and that the ultimate acceptance and actual receipt of the ten was as a part of the whole, as required by the statute.

The question of the Statute of Frauds is thus disposed of without reference to the delivery and acceptance of the twenty bags of the wool ordered on the 30th April, which transaction was a good deal discussed on the argument and without any reference to the question whether a memorandum in writing sufficient to satisfy the 17th section of the statute could be found in the correspondence. Therefore I do not enter upon the discussion of those points. I may, however, just refer to a note to section 31 of the third American edition of *Benjamin* on Sales, and to the case of *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140, as authorities, which shew that there is no room for a doubt, which one of the learned counsel for the defendant seemed to entertain, that whenever one of the acts is done which satisfies the 17th section, it relates back in its effect to the date of the verbal contract.

We have now to deal with the substantial question of the nature of the contract.

The only findings on the subject, which were noted by the learned judge, were the following: "I find that the defendants did not purchase any quantity of black wool except the first ten sacks, and have paid for the same. I find that the white wool was not of a quality known as 'super' but was of an inferior quality, and was not fit for use by the defendants. I find that the plaintiff gave no warranty as to the quality of the wool beyond selling it as 'super,' and did not sell or represent it to be 'extra.' I find that the defendants have paid into Court money sufficient to discharge the plaintiffs' claim. If there is any question as to this it can be referred to an official referee;" and he dismissed the action.

The plaintiffs moved in the Divisional Court to set aside the judgment and for an order directing judgment for the plaintiffs for the amount of their claim or for a new trial on the ground that the evidence shewed them entitled to judgment; and on the ground that the sale was of a specific article without warranty; and that there was an acceptance

"DEAR SIR,—After talking the matter of keeping the late purchase of wool over with Mr. McRoberts we have decided to have you dispose of the greater portion of the white. You said you could sell it at an advance on the price we bought at. We find there will be more than we will need, and you may therefore sell the white."

To my mind it is utterly impossible to reconcile the two pieces of evidence, and McWilliams's explanation, which is, that when he wrote the letter he supposed that the ten sacks of black wool were still in the plaintiffs' warehouse, while it makes quite too strong a draft on one's credulity, would not, even if believed, reasonably account for the language of the letter. It happens also that the money paid into Court is computed on the reduced prices of both white and black, which is not justified by any one of the three modes in which the offer may be supposed to have been made.

Still, the first mode is that on which the defendant insists. The Court has acceded to his contention, and found as a fact that the purchase of the white wool was a transaction separate from the purchase of the ten sacks of the black wool, and that there was no bargain for the black wool beyond the purchase of the ten sacks, and the plaintiffs do not now impugn that finding.

The transaction, as so found, was an offer of a lot of wool at 24 cents per pound, and an acceptance of that offer. No authority has been produced for the proposition which the defendant now advances, that one party to a bargain of that kind is precluded from enforcing it against the other party, merely because he has asserted, and unsuccessfully attempted to establish, that the bargain included a sale of some other goods for their own price.

The questions concerning the quality of the wool have to be noticed.

[The learned Judge then considered the question whether there had been any warranty which under the circumstances he found there had not been, and continued:]

These, however, are matters aside from the considerations on which the decision has to turn. We have, if I am correct in the views I have taken, a contract evidenced

as required by the 17th section of the Statute of Frauds, by the acceptance and actual receipt of a part of the goods sold. The contract was the sale to the defendant of specific goods, without warranty of quality, at an agreed price which was to bear interest at seven per cent. per annum from the 1st of February, 1884. Nothing appears to have been expressly said of the time of payment.

The reasonable implication would probably be, that the defendant was to pay for each lot as he took actual delivery of it and the plaintiffs ceased to "carry" it. No question is raised against the plaintiff's right to immediate payment if the defendant is bound to take the goods, nor could the defendant raise any such question in the face of his disclaimer of all liability on the contract.

The amount which the plaintiffs are entitled to recover ought to be easily computed by the registrar without the formality of a reference.

The effect of the findings of fact I understand to be to entitle the plaintiffs to be paid for all the white wool at 24 cents per lb., with interest at seven per cent. from 1st February, 1884, the value of the sacks at 35 cents apiece being added to the price of the wool before interest is computed; and to be paid for the black wool at 22 cents per lb. The quantity of black wool being that charged in the invoice of 24th January, and the price, plus \$3.50 for the ten bags, bearing interest at six per cent. from 24th January, 1884.

The appeal should be allowed, with costs.

HAGARTY, C. J. O.—In agreeing to the allowance of this appeal, I do not consider that I am differing substantially from any conclusions of fact by the trial Judge. I am unable to assent to the conclusion of law of the Court below as to the Statute of Frauds.

The learned Judge found that there was no warranty as to quality beyond selling it as "super."

I think if there had been a jury it would have been a proper question for them whether the defendant bought

the wool on his own inspection and judgment with full opportunity to examine it as thoroughly as he pleased, it being present before him at the time of purchase, that he was invited to examine, and did examine as far as he pleased, or whether he bought it on the warranty or undertaking of plaintiffs as to quality. If on the jury I should unhesitatingly find on the former part of the proposition and against the defendant.

I think he purchased wholly on his own judgment and their own inspection, and that he did so with the fullest opportunity of examining every sack if he had thought proper so to do. We are only interfering as to the white wool. If defendant bought, as I think he did, he did so, at his own risk.

My brother Galt seems to consider that there were two contracts as to the white wool. I regard the second and final bargain made before performance of the first as a variation of or substitution for the first, and that any delivery or receipt was on the only one existing contract.

If this case be carried further it will be open to the plaintiffs to argue as to the effect of the letters that passed between the parties as to the white wool in which the price is mentioned and the article itself designated, and whether the case can be brought within such authorities as *Macdonald v. Longbottom*, 1 E. & E. 987 in error, and subsequent cases.

On the argument before us this point was not pressed for some reason or misunderstanding.

BURTON, J. A., concurred.

OSLER, J. A.—As to the black wool, I agree with the Court below that there was no contract beyond the ten sacks. I do not differ from the findings of fact or estimate of credibility of the defendant.

As to the white wool there was clearly a contract, a verbal one—first, as to the ten sacks which was afterwards on the same day before performance or breach

varied by parol, and that contract, as the defendant understood it, was to take the lot, that is the whole of the white wool at 24c. In this particular only I differ from the Court below. If they had seen their way to that conclusion which, I think, is the proper conclusion from the evidence, I have no doubt that they would also have held, as I think it must be held, that the subsequent delivery referred to that contract, and that there was an acceptance and receipt thereunder by the defendant which satisfied the Statute of Frauds. I am clear that there was no warranty of any kind. The defendant bought the wool upon his own examination and opinion of it. The warranty mentioned in the finding of the learned Judge is not the warranty alleged in the defence, and I think from the manner in which he refers to it he had no intention of finding that any warranty existed on which a defence could be founded. It probably refers only to the word "super," as found in the invoice of the twenty sacks. On the evidence it cannot be held that when the contract was made there was such warranty.

I therefore concur in allowing the appeal.

Appeal allowed, with costs.

EXCHANGE BANK V. SPRINGER AND MURRAY.

EXCHANGE BANK V. BARNES AND MURRAY.

*Principal and surety—Penalty of bond—Interest on amount found due—
Death of surety, knowledge of.*

On the appointment of M. as cashier of the Ex. Bk., S. & B. became sureties to the bank each by a bond for \$5000 conditioned for the faithful discharge of his duties as such officer so long as he should continue in the service of such bank &c. After M. had been in the bank for two years and a half he absconded, leaving a deficiency of about \$30,000, occasioned by his misappropriating to his own use the moneys of the bank. In actions brought against S. and the executor of B., who had died during his tenure of the office, the defence was raised that M. had been engaged by the directors in illegal speculations in the stocks of the bank as well as in other stocks and that they had not exercised a proper supervision of his acts, but this objection to the bank's right to recover was overruled and on appeal to this Court the judgment of the Court below was affirmed with costs.

The bond contained a stipulation that in the event of any sum being found due by M. to the bank interest should be payable thereon from the time an account of the balance due was delivered to the parties to the bond by the bank, and judgment was given in the Court below in excess of the penalty.

Held, however, as the law would not allow a verdict against the obligors for a greater sum than the penalty, interest could not be computed on that amount until after judgment.

The fact that the knowledge of the death of a surety had reached the officers of the bank formed no ground for relieving his estate from liability upon the bond.

THE first mentioned case was an appeal from a judgment of Mr. Justice Ferguson, pronounced on the 4th of March, 1884, ordering the defendants to pay the principal sum of \$5,000 with interest thereon, in all \$6,550.95 cts., and also the sum of \$591.40 cts. for costs.

It appeared that on the appointment in December, 1876, of the defendant Murray as cashier of the plaintiff company, a bond dated the first day of that month, in the penal sum of \$5,000 was executed by Murray and by Springer, as one of his sureties, for the payment of which sum to the plaintiffs, their successors and assigns, the said Murray and Springer did jointly and severally bind themselves, their and each of their respective heirs, executors and administrators, subject to the condition that if

“The said Charles Robert Murray, do and shall from time to time, and at all times hereafter, so long as he shall continue in the service and employ of the Exchange Bank of Canada (hereinafter called the bank) in the capacity aforesaid, or in any other capacity at the said branch or agency, or at any other branch or agency of the bank, or at the chief seat of business of the bank, honourably, diligently, and faithfully demean and conduct myself in such service or employ, and use my utmost endeavours for the benefit and advantage of the bank, and willingly obey all the lawful commands of the bank touching my duties therein, and shall in all instances, as well whilst in the service or employ of the bank, as after I shall be discharged therefrom, retain and keep secret, except from the President and Directors of the bank and such officers and other employees thereof as shall be entitled to the knowledge, all such transactions and matters relative to the affairs or business of the bank, as in the course of such service or employ shall be entrusted to me, or shall either directly or indirectly come to my knowledge; and shall also duly, truly, and regularly render and deliver to the bank or to such person or persons as the bank shall from time to time appoint for that purpose, a just, true, and faithful account in writing of all such moneys, securities for money, bills, notes, bonds, deeds, writings, books, securities, goods, chattels, effects, matters, and things whatsoever, as have, or shall from time to time come to my hands, custody, or charge, of, or belonging to the bank or to the correspondents or depositors thereof or therein, or to any other person or persons whomsoever wherewith the bank shall or may be chargeable; and also, if we, the said obligors, or either of us, our, or either of our heirs, executors, or administrators, shall, and do make and give, or cause to be made and given unto the bank, our [their] successors, or assigns, full and entire satisfaction in lawful money of Canada for all such moneys, securities for money, bills, bonds, notes, deeds, writings, books, securities, goods, chattels, effects, matters, and things, whatsoever, of, or belonging, as aforesaid, as at any time or times, shall appear to have come into the hands, custody, or charge of me, the said Charles Robert Murray, and shall not be by me duly and faithfully accounted for to the bank, or which shall be found, confessed, or proved to have been, or to be lost, wasted, misapplied or otherwise made away with, or unjustly detained by me the said Charles Robert Murray, or by any other person or persons, by or through my means, privity, or procurement; and shall from time to time and at all times hereafter, save, defend and keep harmless and indemnified the bank and the estate, property, and the effects of the bank, of, from and against all and all manner of actions and suits, cause and causes of action and suit, sum and sums of money, losses, costs, damages, and expenses, liabilities, engagements, claims and demands whatsoever which shall or may from time to time, at any time hereafter be commenced and prosecuted, enforced, sustained, incurred or made against, by or upon the bank, or the estate, property or effects of the bank, for or by reason, or by means or on account of the breach, non-observance or non-performance of all or any of the matters or things aforesaid, on the part of me, the

said Charles Robert Murray, or otherwise by reason or means of my misconduct, or of any act, deed, matter, or thing done or neglected, or omitted to be done by me, then the above written bond or obligation shall be void, otherwise the same shall be and remain in full force and effect."

The bill charged that Murray in violation of his duties as such cashier, had misapplied and appropriated to his own use the funds of the bank to the amount of \$29,705.59; that Murray had, on the 22nd of February, 1879, absconded from Canada, without paying any portion of his liabilities to the plaintiffs. The bill asked that the defendants might be ordered to pay the said sum of \$5,000 and interest, and for further relief.

The defendants severally answered the bill. Springer insisting that the President and Directors of the bank had improperly and illegally dealt with the stock of the bank, and also speculated in other stocks by reason of which great losses had been sustained by the bank: and that if Murray had improperly used the moneys of the bank, they, the directors, &c., had improperly afforded facilities to Murray to make away with the funds of the bank, and that by reason thereof he, the said Springer, was relieved from further liability.

In the second case; that against Barnes and Murray, the circumstances were identical with those in Springer's case, with the additional fact that the defendant Barnes was the executor of George Barnes, one of the obligors in the second bond given by Murray to the bank. Barnes in addition to the defence raised by Springer, contended that after the death of George Barnes, or at all events after the fact came to the knowledge of the officers of the bank, the liability of the deceased's estate ceased.

The other facts appear in the judgment of Hagarty, C. J. O.

The appeals came on to be heard before this Court on the 14th, 17th, and 18th of May, 1886.*

Robinson, Q. C., and R. Martin, Q. C., for the appellants.

**Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

Bain, Q. C., and *Laidlaw*, Q. C., for the respondents.

September 7, 1886. HAGARTY, C. J. O.—It seems to me impossible to avoid the conclusion, on an examination of the evidence, that the plaintiffs have established a case of default against the cashier, the defendant Murray, to an amount exceeding the penalties in the two bonds, and that such default and loss of money fall within the provisions of the bonds as matters against which the sureties agreed to secure the bank.

The provisions in the bonds, as stated in my brother Ferguson's judgment, that an account of the moneys claimed against the sureties taken from the books of the bank should be *primâ facie* evidence that the sums claimed are due and payable, seems to be a very reasonable provision in the case of a cashier who has the charge of and full control over the bank books, and whose business and duty would naturally seem to be to see that they properly represent the position and distribution of the bank assets.

The bond further contains this salutary provision that the obligors shall have full power to establish by satisfactory proof that the moneys stated in such account as being due to the bank are not so due.

It was fully open to the defendants to disprove the accuracy of the agreed on *primâ facie* proof. The burden was on them so to do if possible.

If we hold the accounts taken from the bank books to be inaccurate, we have to rely solely, as it seems to me, on the evidence of the cashier Murray, the only witness called for the defence. His evidence was taken on commission in the United States. He was acting cashier up to Saturday, the 22nd February, 1879. He attended a board meeting on that day. Heavy losses had been incurred by the bank, especially in Montreal Telegraph stock. There was an account kept called the "C. R. Murray Trust Account," a private account of his own, and a U. S. currency account.

It is clear from his evidence that on that day he suspected the directors were about displacing him and

appointing another cashier, and he repeats a conversation he overheard on that subject in the Board room. He gives the following evidence :

"During the day on which I left I intended to make an adjustment of the "C. R. Murray trust account," and went to the vault to look for the cheques on that account ; I could only find a few of them ; I requested Mr. C. E. Gault to hunt them up for me ; he said he would do so ; I was occupied during the afternoon at a Board meeting, considerable amount of business being transacted ; I was completely exhausted when the Board adjourned, my health at that time being very bad. As I was coming out of the board room the inspector stopped me, and asked me if I had any of the "C. R. Murray trust account" cheques ; I told him I had not ; he asked me if I had any cheques of my private account ; I said yes, there were some of them in my desk ; he could look at them if he wished ; he asked me if I could explain certain entries in the trust account, which he could not understand ; I told him I could not at the moment ; I was too ill and weary ; I walked home with the inspector as far as my house ; he lived some little distance farther on ; as we were passing the city club the president called him back and spoke to him in a most mysterious way, evidently not wishing me to hear : taking this in connection with the general treatment of the directors towards me at this time, and also my overhearing some remarks between Mr. Caverhill and Mr. Crathern, which I judged or got the impression referred to my displacement and the appointment of a new cashier—I was at that time almost broken down mentally and physically—I came to the conclusion that the directors of the Exchange Bank intended to fasten upon me if possible the responsibility for the losses the bank had sustained, and further, knowing that only the Vice-President and myself had any definite knowledge of the speculations in telegraph stock and the impossibility of adjusting and explaining the trust account, in the absence of the vouchers, I felt that I was in a very hazardous position, as in the event of the directors causing my arrest, I could not give evidence in my own behalf, so I concluded that my wisest course was to put myself out of their power, as in my condition of body and mind I could not have borne up against any harsh proceedings on their part. I left Montreal by the first train going out without any clear intention of going to any place in particular ; it happened to be the train for Portland, which stopped at Island Pond : I remained over Sunday, and left there on Monday morning for Auburn, in Maine ; there I was confined to my bed for two weeks without being able to move ; after that I went to New York.

Since his departure under the foregoing extraordinary circumstances Mr. Murray appears not to have returned to Canada. In his voluminous evidence on commission he meets most of the direct questions as to the entries against him in the books by declaring that he cannot answer without reference to cheques and papers not produced.

The learned Judge thus deals with his evidence: "As to the breach of the bond for which the suit is brought. It was admitted that this account and statement which is Exhibit I was served or delivered the required time before the commencement of the suit. It was also admitted that if the plaintiffs were entitled to succeed there was a loss far exceeding the amount of the penal sum in the bond. At this stage, and looking at the right or not of the plaintiffs to recover upon the contract according to its terms only, the burden is cast upon the defence to establish by satisfactory proof that the sums of money stated in the account above mentioned as being due and payable to the plaintiffs are not so due and payable. For this the defence relies upon the evidence of the defendant Murray, and as pointed out by Mr. Patterson, his evidence is wholly unsatisfactory upon this subject. He is willing to say and does say that he did not use any of the moneys of the trust account for his own private purposes. He, however, admits that he did draw cheques on this trust account for his own purposes, but he says that he recouped this account by drafts on his private account. He says he cannot tell or shew at all in detail how these transactions were, owing to his not having certain memoranda which he says were or ought to be in the bank, and the plaintiffs' witnesses say that these memoranda were not to be found in the bank. Murray says he left them there when he went away, and the plaintiffs say they cannot be found. In this respect the defendants had the ordinary means of procuring evidence: the onus was plainly upon them, and their contract required them to furnish satisfactory proof. It cannot be said that when the onus is upon a party to any litigation it is sufficient for him to say that he could furnish the necessary proof if he had certain papers. It is his duty to have these papers or to have them produced, the means of causing their production being what the law deems ample. If the documents are his evidence, and they are lost or cannot be produced the misfortune is his, and he cannot be said to have proved his case because he says he could prove it if he had certain papers, or rather says he cannot prove it without the papers, and intimates that he could if he had the papers. On this branch of the case I am of the opinion that the defendants' evidence does not satisfy the onus and that they fail."

I fully adopt this view of the defence. It seems to me impossible to hold that a bank officer thus abandoning his

duties and secretly withdrawing to a foreign country, can be allowed in this fashion to impugn the correctness of the bank books which were, during his term of office, under his own complete control and arrangement.

The evidence very clearly established the fact that Murray had been speculating much on his private account, and as proved by certain brokers' evidence, clearly pointed out by Mr. Bain in his argument, he drew on the Trust account various cheques to meet his own requirements. This, in fact, he admits, as stated in the judgment below, but he adds that he recouped the account by drafts on his private account.

The claims are rested on these accounts: "His private account;" "the Trust account;" "United States Currency account."

The claim on private account is	\$3,435 62
Trust account.....	25,412 75
United States account	857 22
	<hr/>
	\$29,705 59

This Trust account was created about January 2nd, 1877 shortly after Murray became cashier.

Burn, the Inspector, says it "was kept for various purposes in connection with the business of the bank and for none other than to facilitate the business of the bank itself."

He says one of the purposes was, that the bank loaned money on stock, and having made advances to parties on the stocks, these stocks were not necessarily the property of the bank except in trust, and were held in trust.

In consequence of some heavy failures of brokers to whom advances were made the bank had to take over large quantities of the Telegraph stock, and it appears that the directors considered it would be for the interest of the bank to employ brokers to deal in this stock really, but not ostensibly on bank account. It is also asserted that they dealt thus with some of their own stock.

Burn says: "I am not aware of any other stock

but the bank's own stock, and the Montreal Telegraph stock being carried into Mr. Murray's trust account, except such stocks as were loaned, and returned in the ordinary course of business."

It is in this trust account that by far the largest portion of Murray's default is claimed by the bank.

The whole claim reaches to nearly \$30,000, or three times the amount of the aggregate penalties in the bonds, \$10,000.

Making every allowance for possible errors I think we can arrive at no other conclusion than that at least the amount of the two bonds is recoverable.

Without considering the defendants bound in the words of their contract as to the sufficiency in evidence of the statement compiled from the bank books, I should without hesitation or doubt find in the plaintiffs' favor on the evidence before us.

We must now turn to the arguments addressed so very fully and powerfully to us that assuming Murray's defaultations, the plaintiffs have by their conduct debarred themselves from fixing liability on his sureties.

The first ground is, that the plaintiffs employed Murray in transacting what was not the ordinary and legitimate banking business of the plaintiffs, but that they employed him in illegally buying and selling their own stock, and other stocks nominally in his own name, or that of some director, but really for plaintiffs' benefit.

That they negligently afforded Murray the opportunity of misconducting himself in their service, and took no care to prevent him acting contrary to the provisions of the defendants' contract as his sureties, and in fact encouraged him to commit the alleged grievances; and that they had notice of his defaults and drawing of moneys, yet they never discharged him or notified the sureties of his misconduct.

That Murray did make proper entries, but that the business was conducted intentionally with the directors' knowledge in such a shape as designedly to baffle and defeat any intelligible understanding of them, and that

the cheques and vouchers are improperly kept back by the plaintiffs or secreted in their vaults, or they pretend that they have lost the same, and without them the plaintiffs' account against Murray is wholly unintelligible to the defendants or to Murray and to the plaintiffs.

I think these form the substance of the defence urged in the very voluminous answers of the sureties.

It was strongly pressed upon us in argument, that Murray was engaged in speculating on his own account and for his own benefit; that the plaintiffs were aware of this and ought to have dismissed him therefor; and that on the authorities, their continuing his employment with this knowledge would discharge his sureties.

I cannot find any such charge in the elaborate answers of the defendants. As I understand them, they set up all his dealings—apart from what they call his legitimate duties as a bank cashier—as done for and with the privity of the bank and for their benefit.

But the evidence on this head is very unsatisfactory, resting apart from Murray's depositions, chiefly on what was said by Mr. C. E. Gault, son of the president, who was examined 12th November, 1879, and stated he was 18 years of age. This was nearly a year after Murray left the country. He said that three or four months before Murray left, his father said to him he was afraid Murray was speculating too much, but he did not say in what he was speculating. He heard his father say this again a few days before Murray left—and that he was very much annoyed at Murray for speculating so much.

His father, the president, emphatically denies all knowledge of Murray speculating on his own account: that if he had had such knowledge Murray would not have remained in the bank five minutes: that he never had spoken to any one to that effect: that after Murray left he may have have said so to his son.

Messrs. Ogilvie, Buntin, Caverhill, Tiffin, and Crathern, directors, all deny any knowledge of Murray speculating on his own account; and they all seem to have had perfect con-

fidence in Murray until about the time of his leaving. Murray in his evidence admitting his private speculations, says that he has every reason to believe that Caverhill was cognizant of this.

I must confess to a great difficulty in clearly understanding the line of defence set up in the answers of the sureties. It appears to me to be almost wholly, if not wholly, rested on allegations of improperly allowing Murray to deal in matters outside the proper business of the bank for the bank's benefit, and not for neglect or want of proper superintendence of him in his duties of cashier.

But I do not propose to deal with the case on any pleading technicality.

It was also urged in argument that Murray was allowed to be in arrear to the bank on overdrawn account at the date of the bonds, and that the sureties should have been informed thereof. No such defence was pleaded. But a reference to the accounts shews that on that date (December 1, 1876,) the balance against him was only \$128.64. He had been in the bank's employ from the preceding August.

He was only about two and a half years in the bank's employ.

Mr. Burn, the bank inspector, states that unless expressly directed by the directors he would not inspect the head office, and that no such inspection took place during that time; that his duties did not necessarily include the inspection of the head office without instructions.

I am unable to see proof of any such negligence on the part of the directors as would bar the plaintiffs' remedies against the sureties of a defaulting cashier, in any ordinary case. The directors appear to have had full confidence in his integrity, and I see no evidence of anything to have caused them to resort to any special examination of the accounts of the head office under his management.

The rule is stated by Lord Kingsdown in *Black v. Ottoman Bank* (1862) 15 Moore P. C. 483, thus:

"From these cases it is clear that upon the point now in

dispute the rule at law and equity is the same; that the mere passive inactivity of the person to whom the guarantee is given; his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him does not discharge the surety; that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence as in the language of Vice Chancellor Wood, in *Dawson v. Lawes*, 1 Kay 280, to imply 'connivance and amount to fraud,' the surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation, because the employer fails to use all the means in his power to guard against the consequences of dishonesty."

This is, I think, considered to express the general rule. It is referred to in later cases, such as *Guardians of Mansfield Union v. Wright*, 9 Q. B. D. 683; *Carter v. White*, 25 Ch. D. 666.

There is a full review of the authorities in De Colyar, (2nd ed. 1885), 383 et seq; Brandt, sec. 368-9.

The judgment of the House of Lords in *Mactaggart v. Watson*, 3 Cl. & F. 525, is very explicit on the general principle. The creditors had allowed ten or eleven years to elapse without examining the debtor's accounts as they ought to have done; the sureties were still held liable.

The main argument is directed against what is called the unlawful or illegitimate business in which the sureties assert their principal was improperly employed by the bank, and they urge that their risk was unfairly increased by such operations.

Murray, during his connection with the bank, never held any position but that of cashier.

We must be very clear in our understanding of this branch of the case before we hold that the defence is to succeed on its strength. Assuming that it is unlawful for a bank to buy or sell any of its own stock, it hardly follows that its cashier instructed to sell such stock, and selling and obtaining the purchase money therefor, could refuse to account to the bank on the ground of the alleged illegality; or if the directors having a large quantity of Telegraph stock on hand on which they had made advances,

commenced buying or selling some to endeavour to recoup their losses, could their cashier or any clerk employed to buy or sell refuse to account on any ground of illegality?

No claim is here set up for any loss sustained by the bank connected with dealings in their own stock. The great bulk of the claim is made up of drafts by Murray on this trust account, in other words, on the funds of the bank. I do not think it lies with him or his sureties to resist liability on the ground of any alleged improper composition of this trust account. But it is urged that the bulk of the losses was on the drafts on this account, and that the dealing with and management of this account imposed new duties and responsibilities on the cashier foreign to the nature of his appointment and its duties, for the due performance of which the sureties undertook.

The contract is for Murray's fidelity so long as he continued in the service of the bank in the capacity of cashier, or in any other capacity at the head office, or any branch or agency, and that he will give a faithful account of all moneys, notes, bonds, &c., securities, goods, chattels, and effects coming into his hands, custody, or charge, of or belonging to the bank or the depositors thereof, or to any person, &c., wherewith the bank shall be chargeable, &c.

The large accumulation of Telegraph stock—to say nothing of any other stock—in the hands of the bank, rendered it advisable to create this so-called "Trust Account," and it—in common with other moneys or accounts in the bank—was subject to the cashier's orders and cheques.

Now it was proper that the bank, in its discretion, should realise on this stock, and its realisation would naturally be a work of time and labor. The cashier is appointed to do this, and he is allowed to deal with it in his discretion.

For the present, omitting reference to the alleged improper devices for what is called "rigging the market" by buying to keep up the price, there does not seem to me anything of which a cashier's sureties could complain in employing him to manage the realisation of these assets, any more than other general assets of the bank. When

Murray drew cheques on this account they were paid out of the general moneys and assets of the bank, like any other cheque. They are all charged against this account. There is clear proof, as I think, as to some of them that they were given for Murray's private purposes unconnected with the bank. The whole account was as much the property of the bank as any other account kept there, and the cashier, who was allowed to draw on it, was as much bound to debit and credit it with every transaction against or in favor of it and to keep it faithfully as he was in respect of any other account in the bank. His not doing so simply amounted to his withdrawal of so much money from the general moneys of the bank for his private purposes.

I look upon the creation of this trust account as a mere incident in ordinary banking transactions—a dozen such accounts might be created or changed, reduced or increased in number—more work might be thus created for the cashier and his subordinates—that, however, would involve the employment of additional labour just as in the case of an increase in the volume of ordinary business.

Then as to the alleged illegal or improper dealings with stocks. If the directors required a cashier to do any thing positively illegal, he might refuse to do it, at the risk of differing from his superiors. As to the Telegraph stock they had to do the best they could with it to realise their advances. To keep up the price they, it seems, occasionally through brokers bought some of it, as Mr. Burn says, to reduce the average price of the whole that they held. I am wholly unprepared to say that their so doing is a matter affecting the liability of Murray or his sureties.

I have already expressed my view as to the alleged buying or selling their own stock. Whether they sold or bought Telegraph or Exchange Bank stock did not, in my judgment, affect the position of the sureties, or improperly increase their risk. As said by the Superior Court of N. Y., in *Rochester Bank v. Elwood*, 21 N. Y. 93, the bond was for "an assistant bookkeeper," and he was directed

afterwards to keep a book previously kept by the teller. Is not the idea an absurd one that the managers of the bank could not assign to him the keeping of another book without releasing the surety? An increase in the volume of business to be transacted by the cashier, his having to deal with larger and more complicated transactions than might have been anticipated when his sureties were given, cannot, I think, affect the question. So long as his duties were not substantially changed, so as to involve his performance of duty or work not properly belonging to his office, or not reasonably connected therewith, I cannot see how the sureties can complain.

In a case of *Minor v. Mechanics' Bank*, 1 Peters 46, Mr. Justice Story delivering the judgment of the Supreme Court, says, p. 71: "The question comes to this, whether any act or vote of the board of directors in violation of their own duties and in fraud of the rights and interests of the stockholders of the bank could amount to justification of the cashier who was a particeps criminis. We are of opinion it could not. * * Every act of fraud, every known departure from duty by the board in connivance with the cashier for the plain purpose of sacrificing the interest of the stockholders, though less reprehensible in morals or less pernicious in its effects than the cases supposed, would still be an excess of power, from its illegality, and as such void as an authority to protect the cashier in his wrongful compliance."

This latter sentence comes in after a discussion as to the void character of an order by the board on the cashier to plunder the bank or cheat the stockholders, or justify the officers in embezzlement.

I also refer to *Melville v. Doidge*, 6 C. B. 450, where sureties were held liable for money received by a bank clerk eleven miles from the banking house.

In *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, it was held that the surety for an agent in that business was not liable for the agent while engaged in the banking business illegally entered into by the defendants.

In *The State of Missouri v. Atherton*, 40 Mo. 209, it was held that the negligence of the directors and cashier of a

bank in failing to comply with the by-laws of the corporation in examining its affairs, counting the cash, &c., will not discharge the sureties for a teller who applied the bank moneys to his own use. The Supreme Court held the by laws were merely directory, and their performance not a condition precedent to the sureties' liability.

The Albany Dutch Church v. Vedder, 14 Wend. 169, is to the same effect; a plea was held bad that plaintiffs neglected to call their treasurer to an account for seven years after default, from year to year, until he became insolvent, when by their own by law he was bound to render his account every six months. Held, not to discharge his sureties. Citing *Trent v. Harley*, 10 East 34.

It is not easy to see on the evidence how the cashier was in any way embarrassed or prevented from correctly keeping this Trust account by the fact that the directors were buying Telegraph stock to keep up the market, or were buying or selling some shares of their own stock.

If reasonable proof be given—as I think it is given—that Murray drew cheques on this fund for his private purposes, thereby applying the general funds of the bank to himself, I fail to see any connection between such acts and any alleged illegality.

But the defendants urge that the directors strove to keep secret these purchases of stock, and that Murray's apparent appropriation of funds to his own use, can all be explained by his assisting them in keeping up the deception.

Assuming his right to urge such a defence, I see no ground to hold it in any way proved. It all rests on Murray's general assertions, without any actual proof.

I have read his evidence with a profound distrust of its faithfulness either as to the reasons of his leaving the bank and the country, or his assertions of innocence, or as to the missing cheques, which he takes no trouble to have produced or accounted for. The evidence as to these cheques, coupled with his statements to Mr. Burn and others, is much against him.

I have not overlooked Mr. Robinson's argument, based on such cases as *Burgess v. Eve*, L. R. 13 Eq., 450, as to misconduct for which the principal could be or ought to have been dismissed, as I do not see such a defence open on the evidence.

There are also the cases of change of duties or of contract unassented to by the surety, of which *Bonar v. Macdonald*, 3 H. L. 226, is a leading authority. See, also, *Miller v. Stewart*, 9 Wheat. 702, per Story, J.; *Sanderson v. Aston*, L. R. 8 Ex. 73.

There are also cases where the instrument of suretyship stipulated for certain audits of accounts or checks on the principal's accounts, &c.

Lord Selborne, 25 Ch. D. (C.A.) 703, puts the general proposition clearly when he says: "It is an equity which enters into our system of law that a man who makes himself liable for another person's debt, is not to be prejudiced by any dealings without his consent between the secured creditor and the principal debtor. If, therefore, it could be shewn that what has been done here was done without the consent of the surety in prejudice of an implied contract in his favor, I quite agree that he ought not to suffer from it. But there being no express contract, on what ground is it to be said that there is an implied contract?"

A decision of one of the learned Judges of Quebec, now said to be in appeal, has been referred to. These plaintiffs sued the sureties of a Mr. Craig for defalcation. The guarantee there was for Craig as an "employee of the bank" for any default, &c., "on the part of said employee in any capacity whatever." It was held to be a good defence (inter alia) that Craig was made managing director and administrator of the bank from being a simple employee, having as such no control of the affairs, and that the words "in any capacity whatever" extend only to the position of a servant of the bank, in fact on the ejusdem generis principle. No such question arises in the cases before us.

My conclusion on the whole case is, that the defence fails. That the defaults of the cashier are sufficiently

proved, and that no legal grounds have been shewn to exonerate the sureties.

As to the question of interest : I do not see any point made in the voluminous reasons of appeal as to the judgment below giving interest against the sureties, and thereby adding largely to the penalty of the bonds : the penalty in each is \$5,000.

The learned Judge gives this extra amount on the clause in the bond declaring "that from the time of the account being delivered or sent as aforesaid, lawful interest shall become due and payable to the bank on the balance thereby appearing to be due to the bank, and such interest shall be recoverable under and by virtue of the above written bond or obligation."

His attention does not appear to have been called to this point, and it is said that it was not raised below.

If it be open to us to hear it I think we must hold that nothing beyond the penalty can in either case be recovered.

The provision as to interest in the account rendered might be made available, if adding such interest to the amount shewn to be due in the account did not raise the whole claim beyond the penalty.

But it seems established that the surety's liability is bounded by the penal sum. If the plaintiffs' argument be sound it would apparently equally justify a recovery to double or treble the penalty, if the claim for defalcation had been say \$100,000, and a considerable delay had taken place before judgment.

We may refer to the rule laid down in *Branscombe v. Scarborough*, 6 Q. B. 13, 3 Bythewood Convey. 323 ; where the authorities are given ; and *Mayne on Damages*, 228 (1884 ed).

In our own Courts *McMahon v. Ingersoll*, 6 O. S. 301, by the full Court ; *Rundall v. Burton*, 4 Pr. R. 9.

We may also refer to *Mathews v. Keble*, L. R. 3 Ch. 691, reversing 4 Eq. 467. The general principle seems fully admitted.

The decision was on a question of charging a share on property devised subject to payment of certain debts and interest, for which bonds were held from the devisee. It was held that he could not take the estate without payment in full of all interest under the words of the will without paying all and in excess of the penalties.

BURTON, J.—There would be great force in Mr. Robinson's argument if the plaintiffs were seeking to make the sureties liable for a loss arising from the illegal or irregular dealings which are complained of, but I am unable to discover upon the evidence that this is brought within the principle of the class of cases of which the suit in the Quebec Court is an illustration, where the duties of the principal have been varied or enlarged, after the execution of the bond. Nor do I think it necessary to consider what might have been the position of the plaintiffs, if the cashier had been guilty of acts of misconduct in dealing without authority in the purchase or sale of stocks which would have justified his dismissal, and the plaintiffs in place of dismissal had continued him in their employment.

The acts mainly complained of were done on the orders of the directors, wisely or unwisely, with a view to saving themselves from loss upon stocks which they had been under the necessity of taking in payment of debts; orders which I apprehend the cashier was bound to comply with as an officer of the bank.

The breach of duty complained of has no connection with these transactions, but the complaint is based upon the misapplication of the bank's moneys placed under the cashier's control. To the extent of the penalty of the bonds, this is fully established, and I agree, therefore, in dismissing the appeal.

PATTERSON and OSLER, JJ.A., concurred.

Appeal dismissed.

September 7, 1886. HAGARTY, C. J. O.—This case differs in one respect from Springer's. The action is against the executor of the obligor Barnes. I cannot find that the point was taken in the amended answer which is alone before us, but it was raised in argument by Mr. Martin, although not apparently pressed very strongly.

No formal notice of his death was given to the bank. It was known to Mr. Buntin, one of the directors, but the others declared their ignorance of it. It was proved by the witness Barton that he was told of it by Murray, and he (witness) wrote the word "deceased" opposite his name in a book which sets out the names of the officers of the bank and their sureties.

Murray swears that they, he and the president, went over this book together after Barnes's death, as he wanted to examine it as to the sureties, and that the president is mistaken in saying he did not know such a book was kept.

Certainly no notice was given or action taken by Barnes's representatives of the death or as to declining further liability. The obligor bound himself and his executors and administrators, and covenanted on his and their behalf.

If the case depended wholly on the question of notice, I am inclined to hold with the learned Judge below that it was not sufficiently proved. At the most it was simply notice of the fact of death, and not of any action or repudiation of further liability. Therefore it would have to be contended for the defendants that the death with knowledge by the bank, ipso facto, determined further liability. We had occasion to notice some of the authorities in *Cosgrave v. Starrs*, 11 A. R. 156.

A very clear distinction is drawn between this case and a continuing guarantee for advances to be made from time to time to the principal. There, if the guarantor gives notice that he will not be further responsible, I gather from the cases (as I stated in *Cosgrave's* case) that an equity would arise against the right of the creditor to insist on further advances after such disclaimer.

Lush, L. J., in *Lloyd's v. Harper*, 16 Ch. D., 290, very ex-

plicitly so held, pointing out the distinction between such a case and that in which security was given for a man as clerk or collector in a responsible service, as the consideration for his being taken into such service for his fidelity while he held the position. He says: "It was held, and I think rightly, by the Queen's Bench, in *Calvert v. Gordon*, 3 M. & Ry. 124, that the guarantee could not be put an end to as long as the service continued."

The other Judges in *Lloyd's v. Harper* guard themselves from deciding expressly as Lush, L. J., did, as to the effect of death or disclaimer in case of advances from time to time.

In a subsequent case of *In re Sherry*, 25 Ch. D. 692, 703, a continuing guarantee to a named extent not under seal for advances, &c. In the Court below it was taken for granted that the death of the guarantor with notice put an end to further liability, but the case was decided on other grounds.

In appeal the learned Judges declined giving any opinion thereon.

Lord Selborne, C., says: "I am quite aware that this has been in some cases a controverted question, and it may not be considered as finally settled, but I must assume it to have been rightly decided in this case."

Lord Coleridge adds: "I desire with the Lord Chancellor to reserve any expression of opinion upon the important and interesting question whether the guarantee was determined by notice of the death of the surety."

Cotton, L. J., the remaining Judge, had refused to express any decided opinion on the same point in *Lloyd's v. Harper*.

In *Coulthart v. Clementson*, 5 Q. B. D. 42, Bowen, L. J., takes the same view as Lush, L. J., as to guarantees for continuing advances.

Offord v. Davies, 12 C. B. N. S., 748, is to same effect.

In the principal case of *Culvert v. Gordon*, the bond was for the fidelity of a collecting clerk—plea setting up the obligor's death and notice of the desire of his representatives to put an end to the guarantee.

Lord Tenterden held that notice was immaterial, saying: "It would be a hardship upon the master if this could be done. * * It is said that it would be a hardship on the

surety if his liability must necessarily continue during the whole time the principal remains in the service, but looking at the instrument itself it would appear that it was the intention of the testator to enter into this unlimited engagement. It was competent to him to stipulate that he should be discharged from all further liability after a specified time after notice given. This he has not done."

An injunction on behalf of the defendant was applied for and refused: (2 Sim. 253.) The Vice Chancellor said the liability was to continue so long as Calvert kept Edwards (the principal) or he chose to remain in their service.]

On appeal to the Lord Chancellor, 4 Russ. 581, he refused to interfere: De Colyar (1885) pp. 344 and 348.

Beckett v. Addyman, L. R. 9 Q. B. D. 783, may be referred to for the remarks of the learned Judges of Appeal.

I am of opinion this defence also fails.

BURTON, J. A.—I do not attach any weight to the fact that the executors and administrators are named in the bond as they are always included, though not named, for any breach of contract occurring in the lifetime of the deceased, and the mere naming them does not increase their liability.

The question is, what was the contract, and it is clear that it was to be responsible for the cashier, not during the lifetime of the surety, but as long as such cashier continued in the employment of the bank in that capacity, or in any other capacity. That being the contract, it was not revoked by the death of the contractor, nor by notice of his death.

It is not necessary to consider whether the executors could have terminated their liability by notice to that effect, although I apprehend upon a bond of this nature their rights and liabilities would be the same, neither greater nor less than those of their testator.

PATTERSON and OSLER, JJ.A., concurred.

Judgment below varied by limiting it to the amount of the penalty of the bond, and appeal dismissed, with costs.

[These cases have been since carried to the Supreme Court.]

BULMER V. BRUMWELL.

Written lease—Covenant to build—Reasonable time—Admissibility of parol evidence to reform writing.

The plaintiff had under several leases been in occupation of a farm of the defendant's for about 25 years. In consequence of the dwelling on the lot having become unfit for occupation by the lessee he notified the lessor of his intention to give up the premises at the end of his term. Thereupon it was agreed that the lessor would put up a new house, the plaintiff agreeing to accept a new lease for six years and pay an increase in his rent of \$150 a year. Plaintiff also agreed to perform some work in connection with the building in the summer of the first year of the term, and a written lease was executed containing a covenant by the lessor to build a new house "during the said term." The lessor insisted that he had the whole term within which to put up the house :

Held, [affirming the judgment of the Court below] that the circumstances attending the execution of the lease as also the corroboration afforded by the lease itself warranted the Court in admitting parol evidence to shew that the first year of the term was the year in which the house was to be erected.

Held, also, that even if the lease was meant to be silent as to the year for building, a reasonable time would be intended, and that the covenant of the plaintiff being to perform certain work on the building during the first summer of the term, and the increased rent being payable for the whole term then created, the first year must be considered reasonable.

THIS was an appeal by the defendant from the judgment of Ferguson, J., given at the trial, whereby the lessor's covenant in a lease in the pleadings mentioned was directed to be reformed, and the appellant was ordered to pay to the respondent damages for the breach of such covenant and the costs of action.

The action was by Edwin Bulmer against John Brumwell, the statement of claim setting forth shortly that plaintiff had for several years occupied, as tenant, a farm lot belonging to the defendant, and that in July, 1883, the defendant executed to the plaintiff a new lease thereof for six years from the 1st day of March, 1884, "reserving, however, unto the said lessor the field lying between the present buildings and the travelled road," and by the said lease the defendant covenanted as follows :

" And the said lessor further covenants to and with the said lessee that he will build upon the demised premises during the said term a new dwelling-house of the kind, size, and description that may seem to him, the said lessor,

best," the intention of both parties being that the said dwelling-house should be built during the "first year" of the said term, but the words "first year" were in the covenant accidentally omitted.

The statement of claim further alleged that the defendant, taking advantage of the mistake in the lease, claimed that he had the whole term within which to build the house, and refused to build any house for the plaintiff until it suited his pleasure.

The other facts appear in the judgment.

The appeal came on to be heard before this Court on the 4th of May, 1886.

E. B. Edwards, for the appellant. This action has been instituted seeking the specific performance of the lessor's covenant to build, contained in a lease from the defendant to plaintiff, at the same time asking to reform the covenant of which specific performance is sought, and also damages for breach of the covenant so reformed.

The language of the lease as it stands cannot be construed to be a covenant to build either "during the summer of 1884," or "during the first year of the term." The words used "during the said term," effectually exclude the former construction; and there is nothing in the instrument, or in the evidence, to warrant the latter construction.

The rule is almost uniform that Courts of Equity will not receive parol evidence to rectify a written agreement of which specific execution is sought: *Taylor* on Evidence, sec. 1042; *Marquis of Townshend v. Stangroom*, 6 Ves. 328; *Woolam v. Hearn*, 7 Ves. 211; *Clowes v. Higginson*, 1 Ves. & B. 524.

The English authorities, as also the cases in this country, establish that in any case of reformation of documents on the ground of mistake, the evidence must be "of the clearest and most satisfactory description." In the absence of such "if the defendant deny the case set up, the plaintiff's

position will be well nigh desperate—though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the Court in granting the relief prayed.”

There is no such evidence here. Not only no written evidence to support the plaintiff's case, but he has not attempted even to shew whether or not there is any written evidence in existence that may throw light upon the question.

The evidence mainly was that of the plaintiff against that of the defendant, the oath of one interested party against that of the other: *Beaumont v. Bramley*, T. & R. 41; *Fowler v. Fowler*, 4 DeG. & J. 250; *Bentley v. Mackay*, 4 D. F. & J. 279; *Campbell v. Edwards*, 24 Gr. 152; *Dawson v. Graham*, 41 U. C. R. 532; *Parkinson v. Clendinning*, 29 C. P. 13; *Trust and Loan Co. v. Clark*, 3 A. R. 429; *Taylor on Evidence*, 8th ed., 971; *Kerr on Fraud and Mistake*, 500.

Dumble, for the respondent. A fair interpretation of the lessor's covenant to build, reference being had to the terms imposed upon the lessee, as shewn in his covenant to contribute certain work towards the erection of the house in question, shews that it was the agreement of the parties that the house in question was to be built in the first year of the term. Any other interpretation would leave the covenant of no value to the lessee, as the lessor might elect to build the house in the last year of the term, and so perpetrate a fraud upon his tenant.

The covenant is only capable of two constructions, namely, that the house should be built during the first, or during any year the lessor elected. The first interpretation is fair and reasonable; the latter unreasonable and unfair.

The Court will construe the covenant so as to work out a fair result and not a fraud.

In *Woodfall*, it is stated that, “All contracts are to be construed according to the intent of the parties as expressed by their own words, and, if there be any doubt upon

the sense of the words, such construction shall be made as is most strong against the covenantor, lest, by the obscure wording of the contract, he should find means to evade and elude it." *Woodfall's Landlord and Tenant*, 11th ed., 144; *Wilson v. Wilson*, 5 H. L. C. 40, 66. *Addison on Contracts*, 8th ed., 184.

Where there is an ambiguity, the circumstances and surroundings will be inquired into to explain it, and supply the true meaning; and words may often be interpreted by reference to other relevant circumstances of the transaction: *Pollock on Contracts*, 2nd ed. 436; *Doe v. Hubbard*, L. J. 29 Q. B., 67; *McDonald v. Worthington*, 7 A. R. 562.

Here it is contended that the parol evidence adduced by the plaintiff was of "such weight and cogency as to exclude reasonable doubt," that the agreement stated by the plaintiff was the true agreement, and the parol evidence was therefore properly admitted: *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erskine v. Adeane*, L. R. 8 Ch. 765; *Mason v. Scott*, 21 Gr. 634.

June 8, 1886. PATTERSON, J. A.—This is an appeal from a judgment of Mr. Justice Ferguson, ordering the reformation of a lease from the defendant to the plaintiff, by specifying the year 1884 as the time within which the defendant was to erect a dwelling-house on the demised premises, and referring it to the Master to assess the damages for the breach of the covenant to build.

The defendant owns lot number 15 in the third concession of Smith, in the county of Peterborough. The plaintiff had been tenant of the lot for over twenty-five years. His lease which was current in 1883, was for a term of eight years, expiring on the first of March, 1884, at the rent of \$250 a year. He gave notice to his landlord, the defendant, of his intention to leave the farm at the end of his term, the cause of his dissatisfaction being, as he explains in his evidence, the want of a proper dwelling-house, because the house was old and in bad

repair, and too small, the cellar particularly being insufficient for his dairy operations and for protecting his root crops.

The result of negotiations was an agreement to take a new lease for six years from the first of March, 1884, at an increased rent of \$400 a year. The parties do not agree in their accounts of what led up to this agreement. The plaintiff's account is that he refused to renew his term unless a new house was built for him; and that the consideration for which he agreed to pay the higher rent was the expected enjoyment of the new house.

I need not detail the defendant's version of this part of the matter, because the learned Judge gave credence to the plaintiff as against the defendant, and has given his reasons for so doing, which a perusal of the notes of the evidence fully bear out; although the impression produced by hearing and seeing the witness would naturally be more vivid than that to be derived from merely reading the notes.

The new lease did not embrace all the farm, but the defendant excepted and reserved a field containing about six acres lying between the buildings and the travelled road. The lease bears date the twenty-fourth of July, 1883, although the term began only on the first of the following March. I think this fact will be found to have some significance when we come to consider the covenants in question.

These covenants read thus:

"And the said lessor further covenants to and with the said lessee that he will build upon the demised premises during the said term, a new dwelling-house of the kind, size, and description that may seem to him the said lessor, best.

"And the said lessee further covenants to and with the said lessor, that he the said lessee will do all the teaming required to be done for said new dwelling-house, and that he will also dig the cellar for said new house in the summer of eighteen hundred and eighty-four, and that he will also in the summer of eighteen hundred and eighty-four burn a kiln of lime for said new house."

The defendant did build a new house, beginning it in 1883, and the plaintiff did the teaming and dug the cellar for it. This house was not built on the demised premises, but on the reserved field. In June, 1884, the cellar was finished and the plaintiff was let into possession of it for the purpose of storing his roots. He tells us that he did the work and took possession on the understanding that that was the house he was to have under the covenant in the lease, and there is no difficulty in believing his story. The defendant was a bachelor, and had not up to that time kept house; and the circumstances were all, except only the site of the house, just what the lease seemed to contemplate. The lime was not burned by the plaintiff because, as he states and as others also shew, it was cheaper for the defendant to buy lime elsewhere than to put the kiln in repair.

But the defendant married in August, 1884, and required the house for himself, and he then undeceived the plaintiff as to his supposed right to it.

That the information was a surprise to the plaintiff appears from the defendant's evidence as well as from that of the plaintiff.

The defendant does not tell the same story as the plaintiff about the building of the house. He says the plaintiff's work in teaming and digging the cellar was done under a special bargain, and in payment of an old debt or claim of \$250 for some wood. The plaintiff denies the existence of any such claim, and the making of any such bargain; and he asserted the same version of the matter as he now maintains by bringing an action against the defendant in the County Court, where he recovered judgment for \$152 for the work he did; the defendant in that action setting up the alleged debt of \$250, but failing to convince the jury that it was a valid claim or that the work was done in consideration of it.

I refer thus cursorily to this part of the history of the dealings of the parties, without attempting or pro-

fessing to do more than indicate the general position and without noticing the details of the evidence of either of the parties or their witnesses, by way of leading up to the real question for decision, which is, the propriety of the judgment affirming the right of the plaintiff to have had a house built for his occupation upon the demised premises in 1884, or at all events before this action was commenced, which was in September, 1885.

Nothing which has been advanced on the argument before us has caused me to doubt the correctness of the learned Judge's conclusions of fact. I have no hesitation in saying that from reading the evidence, I should myself conclude that the express understanding of the parties, as part of their agreement for the new lease, was that the house was to be built with reasonable promptness, although I might hesitate before finding that they had fixed the year 1884 as the time within which it was necessarily to be finished and ready for occupation. That, however, is not now a matter of any consequence. There is no legal or technical difficulty in the way of acting upon this evidence in ordering the insertion of the time in the covenant. The case is far from being one in which the oath of one party is merely met by the oath of the other. The whole tenor of the evidence goes to corroborate the plaintiff. It may be scarcely fair to say that corroboration may be found even in the evidence of the defendant himself; but it is impossible to read his evidence without feeling that very slight corroboration of the plaintiff would very decidedly turn the scale. I allude principally to those parts of the examination where the defendant is asked to account for the form the admitted agreement assumed, as *e.g.* in the increasing of the rent from \$250 to \$400, and in binding the plaintiff to burn lime for the house in 1884, as well as to the references to the house that was actually built.

The strongest corroboration of the plaintiff is found in the lease itself, which is almost equivalent to saying that

no reformation of that document is necessary to support the judgment for damages.

That is, in my opinion, the correct conclusion, and for that reason I forbear discussing the details of the evidence.

The opposite view requires the contention that to fulfil this covenant to build *during the term*, which was made for the benefit of the tenant, it is sufficient to build at any time before the last day of the term when the tenant quits the premises—"to keep the word of promise to his ear, and break it to his hope."

Such a construction of the covenant is not, in my opinion, the necessary or the proper construction.

If the words, "during the said term," had been omitted from the covenant, the rule would have applied which is thus happily enunciated by Blackburn, J., in *Ford v. Cotesworth*, L. R. 4 Q. B. 127: "Whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances."

That being so if nothing had been said as to time, what force is to be given to the words "during the said term?"

Now, bearing in mind that the new lease was made during the currency of the former term and over seven months before the new term was to commence, we at once see that the landlord is not bound to build the house during those seven months so as to have it ready for the tenant when the new term at the increased rent begins, but that the tenant must be content with the insufficient accommodation of the old house during so much of the new term as may reasonably be necessary for the completion of the new house. It was to be built "during the said term," and not before the said term. The words are thus usefully introduced for the protection of the landlord. They leave the time for completion of the building during the term to be determined by what may be reasonable under the circumstances, and they are quite consistent with the

following covenant which binds the tenant to do, during the summer of 1884, his part of the work in connection with the building, while by that covenant the parties have to some extent indicated what in their view was a reasonable time. In this particular the stipulation respecting the burning of the lime is significant. That stipulation evidently referred to lime for immediate use. The defendant ventured a different theory when he was examined. I shall read three of his answers :

“ Q. Would that lime burned in 1884 be fit for this house in 1887 ? A. It would, if I took the trouble to keep it.

Q. It would be good lime ? A. It would be good lime in ten years.

Q. But not slacked ? A. Oh, yes, it would be slacked ; if I took the trouble to run the lime and make it into putty I could keep it for ten years.”

But I will not do him the injustice to suppose that he expected the Court to believe that the covenant was made with any such idea.

It will be noticed that the plaintiff could not perform his part of the covenant without some previous action by the defendant. The kind, size, and description of the house were by the express terms of the covenant to be decided by the defendant, and so of necessity was the site of it. Until these essentials were settled the cellar could not be dug, and before the kiln of lime could be burned there must have been lime stone and a kiln provided.

The defence sets up the plaintiff's default in these matters as an answer to the plaintiff's complaint, and as ground for a counter-claim ; but the plaintiff's replication is fully proved and fully answers the charge. I refer to his allegation that except as to the house on the reserved field, the defendant made no attempt to build a house, nor did he point out to the plaintiff the place it was to be built on, nor did he make any preparations for building or any demand of the plaintiff in respect to it.

It would be idle to assert, and it is not seriously asserted,

that the defendant's breach of his covenant was in any way caused by any default on the part of the plaintiff.

The appeal must be dismissed, with costs.

HAGARTY, C. J. O., BURTON and OSLER, J.J.A., concurred.

Appeal dismissed, with costs.

GRAND JUNCTION RAILWAY COMPANY V. THE COUNTY OF
PETERBOROUGH.

Bonus to a railway company—Proceeding by mandamus or action—Voting on by-law—Following views intimated by Supreme Court.

The plaintiffs had obtained an order absolute in the Queen's Bench Division for a mandamus for the delivery to the plaintiffs by the defendant municipality of municipal debentures to the amount of \$75,000 being a bonus to the undertaking of the plaintiffs voted to them by the municipality, together with interest thereon from November, 1870. On appeal to this Court that judgment was reversed on grounds equally adverse to any right to proceed by action as to claim by mandamus. The Supreme Court of Canada affirmed that judgment, holding that action and not mandamus was the proper remedy, if any existed, at the same time expressing an opinion that the by-law was invalid. Subsequently the plaintiffs instituted proceedings in the Queen's Bench Division to enforce delivery of the debentures or payment of the amount. At a trial before a Judge without a jury the action was dismissed. On appeal this Court, without exercising any independent judgment in the matter, acted on the views expressed in its former judgment and by the Supreme Court and dismissed the appeal.

Appeal from the judgment of Galt, J.

After the judgments in the case between these parties, reported 45 U. C. R. 302, 6 A. R. 339, and 8 S. C. R. 76, the plaintiffs on the 11th of June, 1883, instituted proceedings in the Queen's Bench Division, seeking to compel payment to the plaintiffs of the sum of \$75,000 with interest from the 13th of November, 1870, or that a mandamus might issue to compel the defendants to issue debentures for the amount as provided by the by-law in the pleadings mentioned, and deliver the same to plaintiffs; and that the

plaintiffs might have such further and other relief as the nature of the case might require.

The statement of defence set forth a general denial of the right of the plaintiffs to recover, and further that the defendants had not power to pass the by-law as demanded by and referred to in the statement of claim.

The action came on for trial at Toronto before the learned Judge, without a jury, on the 23rd of February, 1885, who, after taking time to look into the authorities, pronounced judgment on the 28th day of March, 1885, dismissing the action, with costs, observing in the course of his remarks :

“ The facts proved before me respecting the by-law in question were the same as those in evidence before the Court of Appeal and the Supreme Court, and if I had entertained a different opinion from that expressed by the learned Chief Justice and the majority of the judges of the Supreme Court, I should have felt myself bound by their decision. I, however, entirely concur, and therefore hold the by-law was, and is invalid, and dismiss this action, with costs.

“ There were, however, several other matters argued before me, and I think it my duty to state the conclusions at which I have arrived. This action is one based on contract—there were certain conditions to be performed by the plaintiffs before they were entitled to receive the debentures or the money. The 17th paragraph of the statement of claim was that ‘ all conditions precedent on the part of the plaintiffs to be observed and performed, have been so observed and performed, and the said railway has been completed and the chief engineer’s certificate duly given in accordance with the terms of said by-law.’

“ By paragraph 17 of the statement of defence the defendants insist that the plaintiffs shall prove strictly the performance of every condition precedent in the said by-law and in the Acts of Parliament referred to. * * It was proved before me that the company have not constructed their line on the route indicated by the by-law, and consequently are not entitled to succeed in this action. It was urged also by the learned counsel for the defendants that ‘ the certificate of the chief engineer of the said railway company of the performance of said condition ’ was also a condition precedent, to which the learned counsel for

the plaintiffs answered that such certificate was merely a ministerial act, and could be supplied. I need say nothing on this subject, as it is perfectly plain that no such certificate could be given, it being admitted that the railway had not been constructed on the route indicated by the by-law.*

The plaintiffs thereupon appealed to this Court, and the appeal came on for hearing on the 26th and 27th of April 1886.*

The facts giving rise to the action are fully stated in previous reports of the case above referred to.

McCarthy, Q. C., and *W. Cassels*, Q. C., for the appellants,
Moss, Q. C., and *Edwards*, for the defendants.

September 7, 1886. HAGARTY, C. J. O.—The litigation on this dispute has disclosed some remarkable difference in judicial opinion.

On the application for mandamus, in the Court of Queen's Bench (of which I was then a member,) it was held that the Ontario Acts had in effect affirmed and recognised the Dominion Act creating the plaintiffs' corporation, and rendered it unnecessary to decide whether it was intra or ultra vires.

The Court also held that the Ontario Legislature completely validated the by-laws. No point was made by defendants as to the validation being limited to the mere supplying the want of a third reading.

My learned brother Cameron only differed as to the appointment of the trustees.

This Court, on appeal from the Queen's Bench, (8 A.R. 339) held (Proudfoot, V. C., reserving his opinion on that point) that the Dominion Act was ultra vires, and its recognition by the Ontario Legislature insufficient, and that the second Ontario Act of 1874, created a new corporation—that, in effect, when the by-law was voted on there was no corporation existing to be the object of its bounty, or capable of

**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

claiming the debentures. The only written judgments are those of my learned brothers Burton and Patterson.

As I understand them they did not accede to the limited effect claimed for the Ontario Acts as to validating the by-law.

It was also considered that the objection as to the trustees would be fatal to the claim for mandamus; other objections might be pointed out.

The case then went to the Supreme Court (8 S. C. R. 76.) There it was unanimously held that mandamus was not the proper remedy; that it was only in the form of an action that the merits could properly be raised; the learned Chief Justice held as to the validating legislation, "the intention was to cure no irregularities, but merely to supply an omission—viz., assuming everything to have been regular and legal, then and then only to treat it as if it had been read a third time; the very dealing with the third reading involving the absolute necessity of there having been two previous readings, shewing clearly that the intention to make the passing of the Act equivalent to a third reading, was necessarily based on the by-law having had two previous readings." It is also considered an objection that the words of the statute, "and which was approved of by a majority of the duly qualified electors of the county of Peterborough," are not met by the fact that out of 3000 qualified voters only 1023 voted, and the majority for the by-law was only 89. The judgment concludes thus: "Thinking then, as I do, there was no valid by-law, I feel bound so to decide. To decide the case on such grounds as that the remedy is by suit and not by mandamus, which can only arise in the event of there being a valid by-law, would be to my mind misleading, and induce further litigation, which, if I have arrived at a correct conclusion, I think should end here."

Mr. Justice Fournier concurred. ¶

Mr. Justice Henry considered that "the by-law never was read—never was passed the first or second reading, and it appears to me that the statute only validated the want of a third reading."

He also considered that the remedy, if any, was by action, not by mandamus.

Mr. Justice Gwynne agreed with my brother Cameron's view in the Queen's Bench as to the trustees, and that this was fatal to the claim for mandamus.

He also concurred with Mr. Justice Patterson that the effect of the Ontario Act was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to grant a bonus to the company.

Mr. Justice Taschereau concurred with Mr. Justice Gwynne, except as to some remarks of the latter doubting the power of the Ontario Legislature to pass the Act in question.

It appears to me that our only course must be to dismiss this appeal.

The judgment of this Court proceeds, as I read it, on grounds equally adverse to any right to bring this action as to claim mandamus.

It held that there was no corporation in legal existence capable of taking this bonus, and that the Ontario Legislature did not confirm or set up the corporation which the Dominion had illegally created, and that the Act of 1874 created a new corporation.

The ratio decidendi of the Supreme Court judgment was that action, and not mandamus, was the proper remedy—if any existed.

I may therefore say, with deference, that I am at present unable to see how it would be a serious objection, under our municipal system, as to the want of second and third readings, if the council had read and passed as their by-law the by-law as published in the newspapers and voted on by the people; or that anything turned on the want of an absolute majority of the whole body of electors, or as to any mistake in the statute as reciting erroneously that such absolute majority had been obtained.

A large amount of evidence has been taken in this case. The facts are stated with much greater particularity in

the evidence than as they appeared on the motion for mandamus.

The learned Judge (Galt) who tried the case considered that the facts were substantially the same as disclosed in the former proceeding.

I incline to think that nothing now before us would probably have affected the view taken by the Supreme Court as to the history of this by-law. The learned Chief Justice sets forth the affidavit of the clerk of the council. His present evidence states much more fully what did take place.

It would seem, from the remarks of the learned Chief Justice, that the members of the council must have been before them.

We are told that whatever may be our decision, this case is to be carried to the Court of last resort.

I most cheerfully follow the decisions of this appellate Court and of the Supreme Court. The latter decision is based upon reasons different from those that governed this Court. I was not concerned in the hearing in appeal, and perhaps, from the fact of my having given judgment in the Court below in favor of the appellants, it is somewhat unfortunate that I should have heard this appeal.

With great deference, I am still unable to see in what the Court below erred as to the two main points: 1st. That the Ontario Legislature recognised and affirmed the Dominion charter, thus rendering the "vires" question unimportant. 2nd. That the Act of 1871 made the by-law valid for all purposes, and was not limited to supplying the want of a third reading.

On this latter ground the decision of this Court is in favor of the same view. There are other difficulties in the plaintiffs' way noticed in my brother Galt's judgment, and also in this Court by my brother Patterson.

I do not consider it necessary further to discuss them as this Court can do nothing but dismiss the appeal on a point already decided by itself.

BURTON, J. A.—The grounds upon which the majority of the learned Judges in the Supreme Court decided the case when before them on the motion for a mandamus, would, if sound, be equally fatal to the plaintiffs' success in this action; and as that judgment is binding upon us, our only course is to dismiss the appeal, leaving the parties, if so advised, to test the correctness of that judgment before a higher tribunal.

I should have found it difficult, if the case had come before us, unfettered by that decision, to have brought myself to the conclusion that there was any valid objection to the by-law. I mean, in other words, that assuming the legislation to have the restricted effect contended for, and to give to the by-law no greater or further validity than if it had been passed by the council after having been approved by the ratepayers, and after the municipalities had obtained the power to grant a bonus, I fail to see any objection which would have avoided the by-law even on a motion to quash.

I am unable, with great deference, to bring myself to the view that the formalities of a first, second, and third reading are in any case essential, although most of the municipal councils have, as a matter of procedure adopted standing orders similar to those in use in parliamentary bodies.

In the case of a by-law which requires the assent of the ratepayers before its final adoption, a copy of the proposed by-law must be published for a prescribed number of times in certain designated papers, with a notice stating that it is a true copy of a proposed by-law which will be taken into consideration by the council after one month from its first publication, stating the date of such first publication; and that the poll will be held at a named day, hour, and place. These details are fully set forth and specified under sec. 286, and its sub-section of ch. 174 of the R. S. O.

Although the form of the by-law seems to have been adopted in a somewhat informal manner by the council at the meeting at which it was proposed, there is no reason to suppose that it was not published for the requisite time

substantially as adopted. We see in fact now more clearly than we did when the matter was before us on the former occasion, that there is no difference in the by-law itself, as published, and that originally proposed and subsequently adopted; the only real objection consists in the fact that the officer finding that the period named by the council for holding the poll would be too short to enable it to be published according to the requirements of the law, substituted another day without calling a fresh meeting of the council. No injustice was intended or apparently done to any one; and if the council with that knowledge had duly passed and adopted it after being voted upon by the ratepayers, it is scarcely credible that any Court would have interfered upon a motion to quash except upon clear evidence that ratepayers had been misled by the alteration.

The Act of Parliament (34th Vic., ch. 48, sec. 2, O.) says, "that the by-law" referring to it as the one approved by a majority of the duly qualified electors of the county on the 23rd November, 1870, is "declared legal, valid, and binding as if the same had received the third reading" of the council.

The same expression "third reading" has crept in here, but it obviously means nothing more than "passed" as required by section 317 of the Municipal Act, R. S. O., ch. 174, which enacts that any by-law which is carried by a majority of the duly qualified electors voting thereon shall, within six weeks thereafter be passed by the council which submitted the same.

Assuming therefore the validating to be restricted as I have mentioned, I am unable to detect any invalidity in the by-law.

The objection that the statute contains a false recital of a material fact which may have operated on the mind of the Legislature, viz., that the by-law was approved of by a majority of the duly qualified ratepayers, appears to be based upon a misapprehension of the law, as the Municipal Act does not require an actual majority of all the rate-

payers, but merely a majority of those who take sufficient interest in the matter to "vote thereon;" but even assuming that such an imposition had been practised upon the Legislature, it alone could provide the remedy, and the courts cannot allow the authority of the Legislature to be impeached upon a suggestion that an Act has been obtained by fraud; but, in truth, the reference to the date and the voting upon the by-law is, I apprehend, merely for the purpose of identifying it with the one it was proposed to validate.

Its being included in the Act was, I have no doubt, an after thought, but as the means relied upon for the construction of the railway consisted to a large extent of these municipal grants, it was very natural when they had a bill before the Legislature for the validating other by-laws to include this also.

The information obtained in the course of the present argument satisfies me that my strictures on a former occasion as to the mode of obtaining the required legislation were not warranted, and that all parties concerned were fully represented before the Legislature.

Apart, however, from being bound by this decision of the Supreme Court, I adhere to the opinions expressed when the matter was previously before us, and which I need not repeat.

Briefly stated, I then thought that the Grand Junction Railway Company, incorporated in 1852, and which had been amalgamated with and become part of the Grand Trunk Railway, had ceased long before Confederation to have any corporate existence, and the power of the Grand Trunk to construct such a line had ceased: that the Dominion Parliament had no power to grant a charter to a new company to construct a line of railway altogether disconnected with the Grand Trunk, but which was a purely local railway and not within their jurisdiction, and therefore when the by-law passed, there was no corporation in existence to avail itself of the grant.

It was not until 1874 that the Ontario Legislature

granted a charter to the persons who had assumed that they were duly incorporated under the Dominion Act, and they might undoubtedly have secured to the new company the advantages intended to be given to the Dominion Company, but I can find nothing in that Act, or in the subsequent legislation to confer upon the new company the right to enforce the claim, they are now seeking to enforce.

I am of opinion, therefore, that the appeal must be dismissed.

PATTERSON, J. A.—The invalidity of the by-law, if it was rightly held to be invalid in the former appeal between these parties, (6 A. R. 339) affords as conclusive an answer to this action for the money as it did to the demand for the issue of debentures.

There may, no doubt, have been reasons, sufficient to defeat the application for a mandamus, which would not necessarily bar an action like the present, but in this Court the whole merits were considered, and, for my own part, I feel that I could not deal in detail with the arguments that have now been addressed to us, without going over the old ground, and in effect repeating what I said in the former case.

I do not enter upon any discussion of the very formidable difficulties, arising on the terms of the contract, which the plaintiffs seek to enforce, and which are in addition to the objections by which the defendants met the application for a mandamus to compel the delivery of debentures to trustees, because the foundation of this action is wanting if our former judgment is correct.

I agree that our only course is to dismiss the appeal.

OSLER, J. A., concurred with HAGARTY, C. J. O.

Appeal dismissed, with costs.

McMAHON V. SPENCER.

*Execution—Practice—Judgment over twenty years old—Revivor—
Scire facias.*

The plaintiff recovered judgment against the defendants on the 3rd of November, 1863, and the last execution issued thereon was returned in September, 1865.

More than twenty years afterwards the plaintiff moved for leave to issue execution against the surviving defendant, but no evidence was given of any part payment on account of the judgment or acknowledgment of liability thereon within that period.

Held, that if the motion was necessary it had been rightly refused.

Quære, whether it was necessary to obtain leave to issue execution upon or to revive the judgment, execution having been in fact issued and returned within six years from its recovery.

Allan v. McTavish, 2 A. R. 278; *Boice v. O'Loane*, 3 A. R. 167, commented on.

APPEAL by the plaintiff from an order of the County Court of Hastings.

The facts giving rise to the application, were set forth in affidavits filed by the plaintiff on the motion, and were to the effect, that on the 3rd of November, 1863, he had recovered a judgment against the defendants for \$166.46; that on the 17th of the month, a writ of *fi. fa.* was issued against goods which was delivered to the sheriff of Hastings on the 12th of February, 1864, and was returned *nulla bona* by the sheriff; that after such return and on the 21st day of April, 1864, a writ of *fi. fa.* was issued against the lands of the defendants, and placed in the hands of the sheriff; that on the 16th of September, 1865, an alias writ of *fi. fa.* against lands was issued and placed in the hands of the said sheriff, under which on the 23rd of September, 1865, certain land in the township of Elzevir, was sold as belonging to the defendants or one of them, when plaintiff became the purchaser of such land for the sum of \$25; that the said sum of \$25 was all the money he ever received upon such judgment; and that on the 16th of March, 1885, he had caused a writ of *fi. fa.* against goods to issue, and the

same was placed in the sheriff's hands on the 1st day of September following, under which the sheriff, between the 1st and 5th days of that month, seized upon certain goods belonging to the said defendant Alva B. Spencer; and that on the last named day, and after the said seizure, the solicitor for the last named defendant served a summons to shew cause why the execution should not be set aside; and upon the 5th day of October, 1885, the Judge of the said Court, made an order setting aside such writ.

Thereupon the plaintiff moved for an order allowing him to sue out execution, notwithstanding the lapse of time, which was refused with costs.

It appeared that the defendant Amos B. Spencer, had died in August, 1869.

The appeal came on to be heard before this Court, on the 29th of April, 1886.*

E. D. Armour, for the appellant.

Neville, for the respondent.

The authorities cited appear in the judgments.

June 30, 1886. OSLER, J. A.—This is an appeal from an order made by the Judge of the County Court of the county of Hastings, dismissing the plaintiff's motion for leave to issue execution on a judgment obtained by him against the defendants on the 3rd November, 1863.

It appeared that writs of *fi. fa.* goods and lands were issued during that year, and the two following years, and that under an alias *fi. fa.* certain land belonging to one of the defendants was sold to the plaintiff on the 23rd September, 1865, for the sum of \$25. The plaintiff swore that this was "all the money he had ever received upon his said judgment." The land was sold by him two or three years afterwards for upwards of \$600.

* *Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

record, may be treated as being in the nature of a specialty debt within the meaning of the Act, just as a debt founded upon an Act of Parliament, which is the highest kind of record, is for the same purpose held to be a specialty debt, or in the nature of one: *Bac. Abr. Limitation*, (D.) 3; *Shepherd v. Hills*, 11 Ex. 55; *Cork and Bandon R. W. Co. v. Goode*, 13 C. B. 826.

It is not here necessary to say whether in view of the later decisions of *Sutton v. Sutton*, 22 Ch. D. 511 C. A.; *Fearnside v. Flint*, *ib.* 579; *Lewin v. Wilson*, 9 S. C. R. 677; *Re Powers—Lindsell v. Phillips*, 30 Ch. D. 291; *Trimble v. Hill*, 5 App. Cas. 342, 344, this Court ought to reconsider its decisions in *Allan v. McTavish*, 2 A.R. 278, and also the case of *Boice v. O'Loane*, 3 A.R. 167, because, if the statute which applies is the R. S. O. ch. 108, sec. 23, and an application for leave to issue execution is, as Wilson, C. J., in *Caspar v. Keachie*, 41 U. C. R. 599, held it to be, "a proceeding" to recover a sum of money secured by a judgment, within the meaning of that section, the period of limitation fixed by that Act had in this case clearly elapsed twice over, and as no part payment or acknowledgment was proved which would keep the judgment alive, the Judge was right in refusing leave to issue execution.

And so if the period of limitation is twenty years, and the proceeding can be treated as equivalent to an action under the other Limitation Act, (which, however, speaks only of an action of debt: see *Wall v. Walsh*, Ir. Rep. Q. B. 4 C. L. 103), the plaintiff is in precisely the same difficulty, and the application was properly dismissed for the same reasons.

If again, the latter Act attaches no period of limitation to a judgment except where it is sought to proceed upon it in an action of debt, and if it was necessary, or the plaintiff thought it necessary, to obtain leave to issue execution the court might well refuse it, acting upon what in *Farrar v. Beresford*, 10 Cl. & F. 319, Lord Brougham calls the legal as well as rational presumption that if a creditor lies by for twenty years, his demand has been satisfied; that

presumption not being in this case rebutted by proof of part payment or acknowledgment within that time, or, by any clear positive and distinct affidavit that the judgment remained unsatisfied. See *Tidd's Practice*, 1828, p. 18, and note; *Blanchard* on Limitations; *Prideaux* on Judgments, 56; *Bingham* on Judgments, p. 161; *Cope v. Humphreys*, 14 Serg. & Rawle 15; *Leake* on Contracts, 962.

For these reasons the appeal should be dismissed.

Whether it was necessary to obtain leave to issue execution or to revive the judgment, or whether, execution having been issued upon it within six years from its recovery, the plaintiff was not at liberty to issue execution upon it at any time afterwards during the defendant's lifetime, without reviving it; or whether in such circumstances, if the Statute of Limitations is not applicable, the presumption of satisfaction ought not to arise from the mere lapse of time where at least no proceedings have been taken on the judgment for twenty years, are questions not now presented for decision.

I may refer on this point to *Bac. Abr. Sci. Fa. (C.)* 2 *Wms. Saund.* 1871, pp. 220, 221; *Simpson v. Heath*, 3 M. & W. 631; *Harmer v. Johnson*, 14 M. & W. 336; *Jenkins v. Kerby*, 2 C. L. J. N. S. 164; *Causton v. Macklew*, 2 Sim. 242; per Sir E. Sugden, *arguendo*.

BURTON, J. A.—This is an appeal from an order made by the Judge of the County Court of the County of Hastings on the 4th November last, refusing an application for leave to issue execution upon a judgment obtained in November, 1863.

The same learned Judge had, upon the 5th of the previous month, made an order setting aside an execution upon the same judgment, on the ground that the judgment had been obtained more than twenty years before the issue of the writ. It appears that the plaintiff intended to appeal against that decision, but the proceedings miscarried in consequence of the appeal being taken to one of the Divisional Courts instead of to the Court of Appeal.

We are called upon to say that the learned Judge was wrong in dismissing this application, but I fail to see any ground for interfering with the decision.

We are not, I think, called upon to express any opinion upon the point raised by the appellant's counsel as to the right of a judgment creditor who has, within six years sued out a writ of execution, to issue further writs of execution at any subsequent period, however remote, but have simply to deal with the application which has been made for leave to issue an execution, and upon that motion I think the learned Judge was perfectly justified in refusing to interfere.

There can be no question that as the law stood before the recent Judicature Act, where a judgment creditor was driven to make an application to the Court for a writ of revivor in order to issue an execution in consequence of more than twenty years having expired after the entry of the judgment, the Court refused to grant the leave unless it was shewn distinctly upon the affidavit that there had been an acknowledgment in writing or payment within twenty years.

In *Loveless v. Richardson*, 2 Jur. N. S. 716, the Court refused to grant such leave, although counsel contended that the objection should come by way of plea to the writ of revivor; when, if the Statute of Limitations was set up, the plaintiff would reply the payment or acknowledgment. It is true that the application in that case was under the 3rd & 4th Wm. IV., ch. 27, applying only to security on land, but that does not affect the question we are considering.

Here the plaintiff has made an application for leave to issue execution. It was either necessary to do so, or it was not; if necessary, the Judge properly refused it because it was not shewn that there had been any such payment or acknowledgment; if not necessary, the Judge was justified in refusing to make any order.

Nor is the case affected by the levy under the execution

upon the property of the defendant; if that can be relied on as equivalent to a payment, it was levied on the 23rd September, 1865, more than twenty years before the application to the learned Judge. If the plaintiff is entitled to issue execution, his proper application is to appeal against the order of the 5th October, which he intended to do; but I find it difficult to say that the present order is wrong.

I am of opinion, therefore, that the appeal should be dismissed.

HAGARTY, C. J. O., and PATTERSON, J. A., concurred.

Appeal dismissed, with costs,

McCONNELL V. WILKINS.

Principal and agent—Partners—Liability of partners for moneys lent to individual member—Practice—Rules 321, 490, O. J. A.

The defendant W. acted as agent for his co-defendants under a written agreement that no partnership should be created between them, or "the parties held to be partners." To all appearance, however, W. acted as a partner and as such effected a sale to the plaintiff of a quantity of wine, &c., at ninety days' credit. Subsequently he applied to plaintiff for a loan of money for the purpose, as he stated, of retiring notes of customers of the firm, but which he told the plaintiff he was desirous of concealing from the other defendants, his so-called partners, and for the amount so borrowed he gave the promissory note of the firm :

Held, [affirming the judgment of the court below] that what transpired between W. and the plaintiff when lending the money, was sufficient to shew that the advance had not been for partnership purposes, and therefore that the other defendants were not liable.

At the trial the jury answered all the questions left to them in favor of the plaintiff and judgment was entered for him, which the County Court Judge subsequently set aside and entered judgment for the defendants,

Held, that under rule 490 O. J. A., the same power is extended to the County Courts as is possessed by the High Court under rule 321, and that the Judge of the County Court was right in giving judgment in favor of the defendants' instead of submitting the question to another jury.

See also, on the same point, *Stewart v. Rounds*, 7 A. R. 575, and *Williams v. Crow*, 10 A. R. 301.

THIS was an appeal from a judgment of the County Court of York, whereby an order nisi to set aside a verdict and judgment entered for the plaintiff was made absolute, with costs.

The statement of claim, filed on the 27th November, 1883, set forth, that the defendants on the 4th of November, 1882, made their note promising to pay the plaintiff or order \$265.50 three months after date, which note became due on the 7th of February, 1883, and had not been paid.

The defendants, by their statement of defence, denied making the note, and their liability for the amount claimed or any part thereof.

The plaintiff having joined issue brought the case on for trial before MacDougall, Junior Judge of the said Court, and a jury, on the 18th and 19th days of March, 1884, when a verdict was rendered in favor of the plaintiff for \$285.80.

The defence relied on at the trial was, that the defendant Wilkins was not a partner with the defendants W. F. Lewis and J. L. Lewis, carrying on business in Montreal under the name of "W. F. Lewis & Co.;" and further, that even if enough had occurred to induce the belief that such partnership did exist, the evidence shewed that the conduct of Wilkins, and the statements made by him, were such as should have satisfied the plaintiff that the money, for which Wilkins had signed the note, had not been required by him for partnership purposes.

The evidence in addition to that to establish the partnership further shewed that the defendant Wilkins, while at Toronto on one of his trips, interviewed the plaintiff and sold him a bill of goods at 90 days ; after which he applied to plaintiff for an advance of money, offering him the firm's note therefor. The circumstances of this transaction, according to the plaintiff's evidence, were as follow :

"I was introduced to him as the head of the firm of J. H. Wilkins & Co., when he asked me to advance him money, as a guarantee that I was all safe. I wanted a purely business transaction, he says," [here witness was interrupted by defendants' counsel], but continuing, said: "I wanted to know, and made inquiries to the best of my knowledge, that he was a member of the firm. Q. Who did you inquire from? A. From the travellers that were with him. Q. Did you ask Wilkins? A. Yes. I never doubted him being a member of the firm of J. H. Wilkins & Co., but I wanted to know who the balance of the firm was. He claimed that Messrs. Lewis were his partners and that they were perfectly good ; that the firm were perfectly good for anything they borrowed, and he also claimed that he wanted money for business connected with the firm ; that some Lower Canadians (I think that is the way he put it) let their drafts go to protest and that they had telegraphed him to arrange them, and that he did not want to let the house know that these Canadians were so dull in protecting their paper ; that is the way he got me to advance it. Q. You did it in the interests of the firm? A. I done it as a business transaction ; I did not have any private interest with him at all."

In cross-examination, plaintiff was asked :

Q. Did you inquire from Wilkins why he did not want to let the firm know. A. No. It is quite ordinary for even members of firms in Ontario here not to draw on their house if they can get accommodation up here. I have done it for several for business purposes I should judge. I have cashed their drafts on houses in Montreal. In this case the defaulting customers had telegraphed Wilkins to help them out. I

don't know as he said that he did not want his firm to know, but he said he wanted to wire them money to take up certain paper. He may have said that he did not want to let the firm know; I am not certain. There may have been some of his sales that he did not want to look like bad sales. I did not know what might be his reasons."

It appeared that the note given on the occasion had been renewed, and some small payments made on it by Wilkins himself, but it was clear that the note sued on arose out of the transaction of which the foregoing was the plaintiff's own account.

The learned Judge left four questions to the jury, which, with the answers of the jury thereto, were as follow :

"1st. Q. Did the defendants, J. H. Wilkins & Co., by their conduct and mode of doing business hold out J. H. Wilkins as a member of the firm? A. Yes. 2nd. Did J. H. Wilkins represent that he desired to borrow the money in question from the plaintiff for the purposes of the firm of J. H. Wilkins & Co? A. Yes. 3rd. Had J. H. Wilkins ostensible authority conferred on him by the firm to sign the name of the firm of J. H. Wilkins & Co. to drafts, notes, or acceptances in business transactions for and on account of the firm? A. Yes. 4th. Were the circumstances of applying for this loan such that plaintiff ought to have made further or other inquiries before advancing the money? A. No."

Upon these answers His Honor entered the verdict for the plaintiff; and in the following April term of the County Court the defendants obtained a rule nisi to set the same aside, and for a new trial on the following grounds :

(1.) That the said verdict and judgment are contrary to law and evidence. (2.) That the finding of the jury to the effect that the defendants by their conduct and mode of doing business held out J. H. Wilkins to the public as a member of the firm of J. H. Wilkins & Co. was not supported by and was contrary to the evidence. (3.) That the finding of the jury to the effect that the said J. H. Wilkins had ostensible authority conferred on him by the firm of J. H. Wilkins & Co. to sign notes or acceptances for the firm was not supported by and was contrary to the evidence. (4.) That the finding of the jury to the effect that J. H. Wilkins represented that he desired to borrow the money in question from the plaintiff for the purposes of the firm of J. H. Wilkins & Co. was not supported by and was contrary to the evidence. (5.) The evidence shewed that J. H. Wilkins informed the plaintiff that he desired to borrow the money in question in order to accommodate third parties without the knowledge and in fraud of the defendants. (6.) That the finding of the jury to the effect that the circumstances of applying for said loan were

not such that the plaintiff ought to have made further or other inquiries before advancing money was contrary to evidence. (7.) The evidence shewed that the purpose for which said money was borrowed was outside the usual course of business, and the plaintiff knew or had probable cause for believing that it was one which the defendants would not have sanctioned, and which was not covered by any authority which J. H. Wilkins had. (8.) The evidence of statements made by J. H. Wilkins, R. H. Howard, and John Lumb, to the effect that the said J. H. Wilkins was a member of the said firm, was improperly admitted in evidence, not being legal evidence against the defendants. (9.) On the grounds of non-direction and mis-direction by the learned Judge in that the jury should have been directed to inquire and determine whether the said advance was made in the ordinary course of the defendants' business, and also that the fact that J. H. Wilkins had authority to draw and indorse bills receivable for goods sold and delivered did not imply power to borrow money in the name of the firm, and also that the fact that there was no memorandum thereof in the defendants' books was evidence that the money was not received for the purposes of the firm.

Upon argument, the rule was made absolute to set aside the verdict and enter a non-suit.

The plaintiff thereupon appealed to this Court, and the appeal came on to be heard on the 6th of November, 1885.*

Fulconbridge, Q. C., for the appellant, contended that the answers of the jury to the questions submitted to them by the learned Judge in the Court below were all substantially in favor of the claim made by the plaintiff, and the evidence was clearly sufficient to sustain such findings: therefore the learned Judge should not have set aside the verdict. He also insisted that the evidence fully established and the jury correctly found (1) that the defendants Lewis, by their conduct, held out their co-defendant Wilkins to the public as a member of their firm; (2) that Wilkins represented to the plaintiff that he desired to borrow the money advanced for the purposes of the firm; (3) that Wilkins had ostensibly ample authority conferred on him by the Lewis' to sign the name of the firm to drafts and notes in all business transactions for, and on account of the partnership; and (4) that the circumstances attending the advance of money by way of loan were not such that the

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plaintiff should have made further or other inquiry before advancing the money.

W. Reeve, for the respondents. The agreement between the defendants Lewis and the defendant Wilkins contained internal evidence that these parties were not co-partners, and never intended to be so or to induce the belief on the part of others that they were such. However, waiving this objection, the Lewis's insist that the evidence given by the plaintiff himself established clearly that the transaction was not a partnership one, and therefore that the plaintiff had acted imprudently, to say the least, in making the advance in the manner stated by the plaintiff himself.

December 23, 1885. BURTON, J. A.—I am of opinion that the judgment of the Court below is right, and ought not to be disturbed.

Upon the findings of the jury which were, I think, fully warranted by the evidence, Wilkins, though not an actual partner, was held out by the defendants as a partner, and the case must be regarded in the same way as if he had been an actual partner, and had the implied authority to borrow money on the credit of the firm for any purpose within the ordinary and usual scope of the partnership business, and to bind them by notes for the repayment of the money so borrowed. But his agency does not extend beyond this, and if the act be in excess of this, he requires a special authority from his co-partners, which may, it is true, be inferred in some cases from their so conducting themselves as to give reasonable ground to the party dealing with him to believe that such special authority existed.

In the present case, no such conduct is pretended or set up, as it was the first transaction apparently that the plaintiff had had with Wilkins, and he did not know previously who his alleged partners were.

The money was borrowed for the purpose of enabling Wilkins, according to the plaintiff's own statement, to retire certain customers' paper, either by remitting at once to

them or to the bank where the paper was lying, or, as is suggested by Mr. Falconbridge, to the firm, leading them to believe that he, Wilkins, had been paid the money by the debtors.

I do not think it very material which view is adopted ; in neither case can the plaintiff say that he was misled by the apparent general authority of Wilkins. That authority presumably exists for the benefit and for the purposes of the firm.

Here the money was not borrowed for the purposes of the firm, but by the one partner to enable him to accommodate certain debtors of the firm ; the borrowing, and the application of the money being both kept from the knowledge of the other partners, with the concurrence of the party advancing the money.

I think the evidence does not bear out the suggestion of Mr. Falconbridge, but, if it did, it amounts to this, that the money was borrowed in order to deceive his partners into the belief that he had been paid by the debtors, when in fact it was not so, and a fraud was to be committed on his partners by leading them to believe that the debtors had paid their debts previous to maturity to him, for that is the only way in which, upon that assumption, the partners could be kept in ignorance that the customers had failed to meet their paper.

In that view, there would be the additional element that the plaintiff concurred with Wilkins in the fraud.

I am of opinion, therefore, that there was uncontradicted evidence, that the plaintiff knew at the time he advanced the money that Wilkins was not acting upon the implied authority which every partner in a commercial concern has, and that if he trusted to a special authority, he dealt with him at his own peril, and, in default of shewing such special authority, should have been non-suited at the trial.

It is, therefore, precisely such a case as to which there could be no possible object in granting a new trial, and unless the learned Judge was precluded, in consequence of this being a County Court case, he was justified in exercis-

ing the very salutary power given under rule 321 of the Judicature Act of finally determining the question in dispute and giving judgment accordingly.

Rule 490 relieves us, in my opinion, from any difficulty on that score, and extends the same power to the County Court as is possessed in the High Court, and the learned Judge below was right in giving judgment as he did in favor of the defendants, instead of submitting the question to another jury. He came, I think, to a correct conclusion when he held that the borrowing under such circumstances was a borrowing which was unauthorised by the partners, although the plaintiff acted in good faith upon a vulgar error that he was securing their responsibility.

The appeal should, in my judgment, be dismissed, with costs.

OSLER, J. A.—The decision of the learned Judge of the County Court seems to be perfectly right.

Assuming that the defendants were partners of J. H. Wilkins, and might have been liable on a promissory note made by him in the firm's name for a purpose within the scope of the business of the firm, yet the transaction between the plaintiff and Wilkins was not, on the plaintiff's own shewing, an ordinary mercantile business transaction.

When Wilkins told him that he did not want to let his firm know that he was borrowing the money, it was as much as to tell him that he had no right to believe that the note was given with their authority.

That very fact rebutted any implication of agency or authority on his part to bind them.

The case of *Arden v. Sharpe*, 3 Esp. 524, cited by Mr. Reeve, and referred to in the latest edition of *Story on Partnership*, sect. 132, is much in point, as also are the cases of *Frazer v. McLeod*, 8 Gr. 268, and *Hogarth v. Latham*, 4 Q. B. D. 643. I may also quote the observation of Mr. Justice Burton in *Wilson v. Brown*, 6 A. R., p. 415:

"The implied power of a partner does not extend to giving the partnership name to secure the debt of a third person, and without distinct evidence that there was an agreement,

authority, or recognition of such a making by the other member, he should not be bound."

I do not think the learned Judge exceeded his power in directing a judgment to be entered for the defendants on the whole case under rule 321 O. J. A. On the plaintiff's own statement as to the circumstances under which he received the note from Wilkins, there seems no reason to believe that it would be of the least use to grant a new trial.

PATTERSON, J. A., concurred.

Appeal dismissed, with costs.

IN RE THE MASSEY MANUFACTURING COMPANY.

Incorporated company—Increase of capital—Notice by Provincial Secretary—27 & 28 Vict. ch. 23, sub-sec. 18—Mandamus.

Held [affirming the judgment of the C. P. D.] BURTON, J. A., dissenting, that the duty of the Provincial Secretary of Ontario in issuing the notice of the increase of the capital stock of an incorporated company, required to be given under 27 and 28 Vict. ch. 23, sec. 5, sub-sec. 18, is merely ministerial; and that on the requirements of the Act being complied with he has not any discretion in the matter, but must issue the notice.

Held, also, that the power conferred of increasing the capital stock by sub-secs. 16, 17, and 18 of sec. 5, is a general power not limited to a single occasion.

Held, lastly, that there is nothing in the Act which makes a prior subscription and payment of the new stock, or a part of it, a pre-requisite to the right of the company to have the notice published.

Per BURTON, J. A. The object with which the statute was passed was to avoid the necessity and expense of applying in each case to the legislature for a charter, thus delegating the power to grant the same to the executive, under certain conditions; there was, therefore, conferred upon the executive the same right to control the increase of capital, as without such statute would have remained with the legislature.

And Quære, per BURTON, J. A. Whether under the Act there can be more than one increase of the capital.

THIS was an appeal from the judgment of the Common Pleas Division, reported 11 O. R. 444, where and in the present judgments the facts giving rise to the proceeding and the questions discussed are fully and clearly stated; and came on to be heard before this Court on the 21st of September, 1886.*

Mowat, Attorney-General, *Irving*, Q.C., and *Neville*, for the appellants.

Robinson, Q.C., *Lash*, Q.C., and *Geo. H. Watson*, for the respondents.

November 9th, 1886. OSLER, J. A.—The question in this case is, whether a writ of mandamus should be granted at the instance of the Massey Manufacturing Company, directed to the Provincial Secretary of the Province of

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Ontario, commanding him to sign a notice for publication in the Official Gazette, pursuant to the 27 & 28 Vict. ch. 23, of the passing by the company and the filing in his office of a by-law for increasing the amount of the capital stock of the company.

The Common Pleas Division made absolute an order nisi for the writ, and the present appeal is brought from their decision, by the Provincial Secretary, and certain dissatisfied shareholders.

The company was incorporated by letters patent dated the 19th January, 1871, with a nominal capital of \$50,000; its purpose and object being the manufacture of agricultural machines and implements of all kinds.

The Act under which it was incorporated, was the 27 & 28 Vict. ch. 23, intituled "An Act to authorise the granting of charters of incorporation to manufacturing, mining and other companies.

The provisions with regard to the increase of the capital stock are contained in the 16th, 17th, and 18th subsecs. of sec. 5, and are as follows:

Sub-section 16. "The directors of the company may, if they see fit, at any time after the whole capital stock of the company has been paid in, but not sooner, make a by-law for increasing the capital stock to any amount they may consider requisite in order to the due carrying out of the object of the company; but no such by-law shall have any force or effect whatever until it has been sanctioned by vote of not less than two-thirds in amount of all the shareholders at a general meeting of the company, duly called for the purpose of considering the by-law, nor until a copy thereof duly authenticated, has been filed, as afterwards provided for in the office of the Provincial Secretary or such other officer as the Governor in Council may direct."

Sub-sec. 17 relates to the contents of the by-law.

Sub-sec. 18. "The company may, within six months after copy of by-law filed with the Provincial Secretary, &c., require and cause a notice under the signature of the Provincial Secretary, &c., to be inserted in the Official Gazette, that such by-law has been so passed and filed,

and stating the number and amount of the shares of new stock, the amount actually subscribed, and the amount actually paid in respect thereof, and from the date of such notice the capital stock shall be and remain increased as mentioned in the by-law, and the new stock shall become subject to all the provisions of law in like manner (so far as may be), as though it had formed part of the stock of the company originally subscribed."

The capital stock of the company had been increased from time to time previous to the 21st October, 1885, at which date it stood at \$200,000, having been increased to that amount from \$100,000 by a by-law passed and filed pursuant to the provisions of the statute and the charter in the month of November, 1884.

On the 21st October, 1885, another by-law was passed by the directors which was confirmed at a general meeting of the shareholders called for the purpose of considering it on the 28th of the following month, enacting that the capital stock should be increased by 3,000 shares of \$100 each, amounting to \$300,000 making the entire capital stock of the company \$500,000.

A duly authenticated copy of the by-law so passed and confirmed was filed with the Provincial Secretary on the 1st December, 1885, accompanied by a declaration of the president of the company that the whole of their capital stock, namely \$200,000 had been allotted, subscribed for and paid in to the company prior to the 21st of October, 1885, the day when the by-law was passed. A notice in the form required by the Act was thereupon prepared and tendered to the Secretary, and he was duly requested to sign it for the purpose of publication, and to cause it to be published in the Official Gazette, pursuant to and in accordance with the provisions of the Act; the official fee for so doing being at the same time paid or tendered.

The Provincial Secretary refused to sign the notice or to allow it to be published on the ground that some of the shareholders had notified him that they objected to the increase of the capital stock.

A few days afterwards the shareholders lodged with the Secretary a petition setting forth their objections to the by-law and requesting him not to insert the notice in the Gazette.

The nature of these objections I shall afterwards refer to.

In the affidavit of the president filed on this application, it is stated that the company declined to answer before the Provincial Secretary, any of the charges or allegations in the petition, and that being advised that his duties were of a ministerial and not of a judicial character, they "would not and did not and had not consented to any adjudication by him upon the affairs and business of the company of an internal nature."

The question appears to have been then referred to the Attorney-General's department, as on the 23rd of December, the company were requested to appear and appeared before him, as did also the petitioners, "in respect of the matter of the issue of the notice."

The company again "declined to formally answer the petition or the statements &c., therein," for the same reasons as before, and insisted that it was the duty of the Secretary to issue the notice for publication, as he had expressed himself satisfied with the performance of the formalities required by the statute.

The Attorney-General then reported to the Lieutenant-Governor in Council, his opinion that the applicants had no right to insist upon receiving the notice for publication if there was thought to be reason for withholding the same either absolutely or without some modification of the by-law. He was further of the opinion that the increase of the capital stock would not, under all the circumstances appearing in the papers be granted by the legislature in a bill for that purpose, without some further provision being made for the protection of the minority; and that the applicants having refused to consent to any modification of the by-law, or to any other provision for that purpose, it was the duty of the Provincial Secretary

to decline to issue the notice, and he recommended that he do decline accordingly.

This report was approved of by an order in council on the 16th January, 1886, and the application for a writ of mandamus, out of which the present appeal arises, was then made by the company.

The case received careful consideration in the Court below where some objections were taken which were not renewed in the argument before us. The authorities are very fully examined in the judgment of my brother Rose.

I think we must assume in this proceeding that all preliminaries or conditions precedent to the right of the directors to pass the by-law of the 21st October 1885, and of the company to confirm it and to require the notice to be published by the Provincial Secretary, were complied with. It is sworn and not denied that the Secretary was satisfied on this point and had so expressed himself. The contest on the appellant's part, as I think is manifest from the report of the Attorney-General, turned upon the nature of the duty, if any, imposed by the Act upon the Provincial Secretary, and his right to inquire into and pass upon the justice and expediency of the by-law.

The first question, and one which lies at the root of the case, is, whether the statute does in fact require the Provincial Secretary to sign the notice for publication. On this point I cannot think there is any room for doubt.

The right of the company under the 18th sub-sec, upon compliance with certain conditions, is, to "require and cause a notice under the signature of the Provincial Secretary to be inserted in the Gazette." True it is that he is not in terms directed to sign it, but if a right is conferred upon the company to cause a notice under his signature to be published in order to give efficacy to their by-law, a corresponding duty on his part to sign the notice is clearly implied. If authority be needed for this conclusion, the following cases may be referred to. Where an Act of Parliament provided that no application for a license to retail beer, &c., should be refused except upon one or

more of four specified grounds, it was held that the justices in refusing the license were bound to state on what ground they did so, and a mandamus was granted to enforce the performance of that implied duty: *Regina v. Sykes*, 1 Q. B. D. 52; *Ex p. Smith*, 3 Q. B. D. 374.

The ancient form of the Commission of the Peace directs that if a case of difficulty happens to arise before the justices, judgment is in no wise to be given unless in the presence of one of our justices of either Bench or one of our justices appointed to hold the assizes in the county. "This," says the Court in the *Queen v. Chantrell*, L. R. 10 Q. B. 587, "not merely empowers, but requires the justices in any case of difficulty to obtain the opinion of a Judge, and by implication requires the judge to give his opinion." See *Pickering v. James*, L. R. 8 C. P. 489.

I think this objection to the application entirely fails. The remaining objections resolve themselves in effect into two, or at most three, viz.:

1. That the duty required by the Act to be performed by the Provincial Secretary is of such a nature that its performance will not be enforced by the Courts, and this either because the duty is one of government or executive in its nature in doing which the Secretary acts as the minister of, or representing the Crown; or because it is one resting in his discretion, merely judicial, not ministerial in its character.

2. That even if the case is one in which mandamus may lie, the Court ought nevertheless to refuse to interfere because under the circumstances disclosed in the affidavit it would not be in the furtherance of justice to grant the writ.

A third objection was suggested for the first time on the argument of the appeal which was not I think much relied on, namely that the company's power to increase the capital stock is one which must be exercised once for all, and was exhausted by the passage of the first by-law.

With regard to the first objection it is manifestly no answer to the application merely to say that the person

named in the statute as the one by whom the particular duty is to be discharged, is a minister of the Crown, unless in discharging it, he can also be said to be acting as the servant or agent, or on behalf of the Crown, in which case of course mandamus will no more lie against him than it will lie against the Crown, whose servant he is.

It will be sufficient to refer to two or three of the authorities upon this point.

In the *Queen v. The Lords Commissioners of the Treasury*, L. R. 7 Q. B. 388 a rule was granted upon the Lords of the Treasury to show cause why a mandamus should not issue, commanding them to issue a treasury minute to the paymaster of civil contingencies, directing him to pay to the treasurer of the County of Lancaster certain sums specified in a schedule, being costs which had been taxed by the county officers in the Criminal Law accounts of the county.

The rule was opposed on the ground that the Lords of the Treasury in paying these accounts were acting for the Crown in paying out and distributing the public money.

In argument Jessel, Solicitor-General, conceded "that where the Legislature has constituted the Lords of the Treasury agents to do a particular act, in that case mandamus might lie against them as mere individuals designated to do the act."

In giving judgment Cockburn, C. J. said :

"When a duty has to be performed (if I may use that expression), by the Crown, this Court cannot claim even in appearance to have any power to command the Crown ; the thing is out of the question. In like manner where the parties are acting as servants of the Crown and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

Blackburn, J., says,

"The question remains whether there is any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by mandamus, because it seems to me clear that we ought to grant a mandamus if there is such a statutable obligation,

particularly where the application is made on behalf of persons who have a direct interest in the matter. But it is here, I think, that the case fails.

"The general principle, not merely applicable to mandamus, but running through all the law is, that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant, as long as he is merely acting as servant. It seems to me that the obligation such as it is, is upon Her Majesty to be discharged through her servants, and you cannot proceed therefore against the servants."

The same distinction was adverted to in the *Queen v. The Commissioners of Inland Revenue, Ex parte Nathan*, 12 Q. B. D. 461, which was a motion for a mandamus to compel the defendants to repay a portion of a sum which had been paid by the prosecutor for Probate duty. It was held that the right of the prosecutor was a right against the Crown in respect of moneys which were in the hands of the Crown, and belonged to the Crown; and for that reason as well as because there was specific remedy by means of a petition of right, and thus to obtain payment of what was in its nature a merely money demand, mandamus would not lie.

In the American Courts the question has been frequently raised, and was very fully considered in *The State of Mississippi v. Johnson*, 4 Wall. 475, 498, a case which appears to be quite in line with the English authorities. Distinguishing between executive and ministerial duty, the Chief Justice says :

"A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple definite duty arising under conditions admitted or proved to exist, and imposed by law."

In the case before us I think the Court below have properly held that the act which the Provincial Secretary is required to do, is not of an executive nature, but is purely ministerial in its character.

It is for the company to determine whether they will pass the by-law to increase their capital stock.

Nothing in the statute warrants the inference that the Provincial Secretary is placed, as it were in the position of the Legislature to exercise such a discretion as it might be supposed the Legislature would exercise in granting an extended franchise. Everything required to be done to give life and validity to the by-law is so done at the instance of the company.

It is passed by them, filed by them with the Secretary, and their right expressly is to require and cause notice of its passing and filing to be published.

The law requires the officer, (who may be the Provincial Secretary, or any other officer appointed for the purpose by the Lieutenant-Governor in Council) to do a specific act in which a private corporation is interested, namely, to sign a certain notice.

Nothing is left to his discretion except to see that the conditions under which the duty arises, have been performed. The nature of the obligation imposed upon him by the Act is not essentially different from that of a registrar to record a deed, or of the proper officer to enter judgment in an action.

It may be noticed that by an Act of last Session, 49 Vict. ch. 16, sec. 32, (O.) the Provincial Secretary is in future to exercise his discretion in respect of signing the notice "in view of all the facts," and subject to the direction of the Lieutenant-Governor in Council.

And under the Companies Act, 40 Vict. ch. 43, sec. 23, (D.) the directors are bound to establish to the satisfaction of the Secretary of State, not only the due passage and approval of the by-law, but also the expediency and bona fide character of the increase of capital, &c., power is given to take evidence on oath and record it, &c.

A somewhat similar power is found in the Ontario Joint Stock Companies Act, R. S. O., ch. 150, sec. 18.

We have next to consider whether there is anything in the second objection which should have induced the court to hold its hand and refuse the writ.

The writ is to be granted only when the right is clear and it is in furtherance of justice. *Prima facie*, the right is established and therefore ought to be enforced.

I by no means say that the Secretary might not have been justified in refusing to sign the notice if specific charges of fraud or bad faith on the part of the directors not explained or denied, had been brought to his notice. In such a case as that, I have no doubt the court would not grant a mandamus, at all events unless they were explained or denied on the application: *Re Langdon and The Arthur Junction R. W. Co.*, 45 U. C. R. 47.

I do not think the objections here taken by the dissentient shareholders are of that character. They are pointed rather to the propriety of and necessity for the by-law, and to its effect in depreciating existing stock, and the possible hardship upon the smaller shareholders, if they should be, as they anticipate, unable to take up the new stock which may be allotted to them, or the whole of it.

The necessity for the by-law is a matter which relates to the internal management of the concerns and business of the company, and of this the directors and the company are the judges. There is nothing before us from which we can say that it was not really passed, because it was considered requisite "in order to the due carrying out of the objects of the company." For aught we can tell the manufacture of malleable iron and the purchase of new premises may be necessary for that purpose. It certainly was not a matter which could be brought into question before or tried by the Secretary or Lieutenant-Governor in Council.

The motive imputed to directors in passing the by-law, in the absence of some specific evidence to support the charge, is equally beyond our cognizance.

If grounds really exist for the interference of the Court with the management of the directors, they might have been and may still be, made the subject of an action to restrain the enforcement of the by-law.

It is observable that the directors have not been examined as they might have been, nor has the president been cross-examined upon his affidavit for the purpose of shewing cause to the application.

I am, therefore, of opinion that the appeal fails, unless the power of the company to increase the capital stock was exhausted by the passage of the first by-law.

Upon the best consideration I have been able to give to this question, I am of opinion that the power conferred by sub-sections 16, 17, and 18, of section 5, is a general power not limited to a single occasion.

It is not so limited in terms. "The directors, if they see fit, *at any time*, after &c., may make a by-law," &c.

The principle is admitted that the shareholders may sanction an increase when they deem it necessary in order to carry out the objects of the company and I do not see that we can hold that the purpose of the statute is fulfilled by the passage of one such by-law. It would follow that, no matter how important it might subsequently be to raise additional capital it could not be done without an application to the Legislature.

The sixth section of the Act permits the applicants for incorporation to have the clauses in question omitted from the Letters Patent and where that is not done I think the intention of the Act was to confer a general discretionary power over the subject upon the shareholders.

Since writing the foregoing an objection has been suggested which though not entirely unnoticed in the Court below, seems to have escaped the attention of the counsel who opposed the application in its various stages before and during litigation, and which was not taken in the reasons of appeal, or argued, or alluded to before us.

It is said that the Provincial Secretary cannot be required to sign the notice mentioned in the 18th sub-section until the new stock or some part of it has been subscribed and paid in, so that subscription and payment of such stock in whole or in part is a condition precedent to the right of the company to require the publication of the notice. I under-

stand that this objection is founded upon that part of sub-section 18 in which the notice is described. "The company may * * require * * a notice * * to be inserted in the Gazette that such by-law has been passed and filed and stating the number and amount of the shares of new stock, *the amount actually subscribed and the amount actually paid in, in respect thereof.*

I do not think we can infer merely from the fact that it is thus alluded to in the description of the notice, that such subscription *and* payment of the new stock, or a part of it, is a pre-requisite to the right of the company to have the notice published. If it is, then inasmuch as no specific proportion of the new capital is mentioned, and it is clearly not necessary that the whole should be subscribed, the subscription of one share and payment of a single call, though serving no conceivable practical purpose, would be a literal compliance with the supposed requirements.

There is nothing in the Act which, in terms, makes a prior subscription necessary in the case of increasing the capital, while, in all other respects, we find that the mode of exercising the company's power to increase it, and the conditions on which they are entitled to a publication of the notice, are carefully and expressly defined.

It is difficult to suppose that it was intended by an allusive and indefinite expression in the description of the notice to confer upon the Secretary "or other officer," by whom the notice is to be signed, an absolute discretion to withhold his signature, or to grant it according to the opinion he may form of the amount which ought to be subscribed, which may directly or indirectly involve an inquiry into, or the consideration of the necessity for the by-law.

There is no indication in the Act that any duty is cast upon him to review the action of the shareholders, or to require that the bona fides of the by-law shall be shewn or guaranteed by a conditional subscription, such as is required by section 3 in the case of an application for letters patent to incorporate a company.

If it had been intended to further circumscribe and check the action of the company, we should, I think, have found looking at this very Act and at other existing legislation of the same Province relating to joint stock companies some express provision as to the proportion of the new stock which should be subscribed prior to the by-law becoming finally operative. Under the Joint Stock Companies' Act, C. S. C. ch. 63, the trustees of the company might be authorized by the shareholders at a general meeting to pass a by-law to increase the stock, but the by-law would not become effectual until at least one-half of the new stock had been subscribed.

The two essential guarantees of the necessity for, and the bona fides of the increase, are those prescribed by subsection 16, viz., the allotment and pre-payment of the whole of the existing capital stock, and the sanction of the by-law for increasing it at a special general meeting of the shareholders of the company.

I think, therefore, that the notice sufficiently complies with the requirements of the Act by stating those facts which the Act has expressly made conditions precedent to the by-law having any force or effect whatever, viz that it has been passed in the prescribed manner and form and has been duly filed.

If stock has been, in fact, subscribed, that must also be stated, but if not, it is unnecessary in the absence of any express provision on the subject to say more than the notice now in question stated viz., that none had been subscribed or paid in.

I think the appellants have not succeeded in shewing that the judgment of the Court below ordering a mandamus to issue was wrong, and therefore the appeal should be dismissed.

HAGARTY, C. J. O., and PATTERSON, J. A., concurred.

BURTON, J. A.—This is an appeal from a judgment of the Common Pleas Division, ordering a mandamus to issue

to the Provincial Secretary to sign and issue a notice for publication pursuant to the terms of sub-sec. 18 of sec. 5 of the 27 & 28 Vict. ch. 23, of the late Province of Canada, passed in 1864.

A number of grounds are relied upon by the appellant Hardy for reversing the judgment, but the point mainly relied on and upon which, in my opinion, he is entitled to succeed is, that a discretion was vested in him acting for and on behalf of the Government to refuse to sign such notice unless it was shewn to his satisfaction that the increase was sought *bonâ fide* for the due carrying out of the objects of the company.

For some years previously to the Act of 1864, a law had been in existence for the incorporation of a certain class of companies, very few in number, and limited in extent, by filing a declaration with the County Registrar, and complying with certain formalities.

But parties seeking incorporation for purposes like the present were compelled in each instance to go to the legislature for an Act of Incorporation, and could obtain only such privileges as the Legislature chose to bestow upon them.

One of the most important considerations either in the formation of a partnership or of a Joint Stock Company, is the amount of the capital stock. It ought to be sufficient to carry on the business of the company with success, but it ought not to be larger than is necessary for the purpose; for the greater the capital the less will be each subscriber's share of profit.

Hence the amount of the company's capital when once fixed, cannot be varied without the consent of all who join the company.

If, however, the charter contain express power to increase or decrease the capital, the shareholders are, of course, bound by such a provision, but the power must be exercised in strict conformity with the terms of the grant.

Here the directors are empowered at any time after the whole of the capital stock has been paid in, but not

sooner, to make a by-law for increasing the capital stock to any amount which they may consider requisite in order to the due carrying out of the objects of the company.

Such by-law is to declare the number and amount of the shares of the new stock. But no such by-law is to have any force or effect whatever, until after it has been sanctioned by two-thirds of the shareholders, nor until a copy thereof has been filed with the Provincial Secretary.

Until these requirements are complied with, the by-law is not to have effect for any purpose.

The by-law is not to become operative until a notice over the signature of the Provincial Secretary has been inserted in the Official Gazette, and this has to be done within six months after the by-law has been sanctioned by the shareholders, and an authenticated copy filed with the Provincial Secretary.

But it will be seen this is not merely a notice that these formalities have been complied with, but is to state the amount actually subscribed, and the amount paid in, and from the date of the publication of such notice, the capital stock shall be and remain increased to the amount in the manner and subject to the conditions set forth in the by-law; *and the new stock shall become subject to all the provisions of law in like manner (so far as may be) as though the same had formed part of the stock originally subscribed.*

In other words, although the by-law is ineffectual beyond the indication of the views of the directors that an increase is requisite, and an approval of that increase by the shareholders, it forms the ground work for the directors to make a provisional allotment of stock, to obtain subscribers and receive payment on account, but as I read it, all these are provisional, subject to become null in the event of the further proceedings required by the statute not being taken within six months.

But I think the further requirements to be inserted in the notice point to the fact that the Provincial Secretary's duties are not intended to be purely ministerial, but

that the Government or some official on their behalf, shall exercise a similar control to that intended to be conferred upon them when granting the original charter of incorporation.

Under the third section the applicants have to prove to the satisfaction of the Government a number of facts, prominent among which are these; that not less than one half of the proposed capital has been subscribed in good faith and at least 10 per cent. paid.

We find further that at least 10 per cent. of the allotted stock is required to be paid in yearly until the whole amount is paid in.

And then we find that no additional capital stock shall be raised until the whole of the original capital has been allotted and paid in.

It is clear, therefore, that the Legislature at this time when delegating this power to grant charters of incorporation, were careful to see that the interests of the public and of the shareholders were protected, and we might reasonably expect to find the same case observed in the provisions respecting the increase of capital.

I think we do find this in the provision that the by-law for the proposed increase shall be acted upon within six months by procuring the stock to be subscribed for. I say nothing about the policy of imposing or not imposing these restrictions, but if they are to be imposed, it would be most mischievous to allow a notice to be signed by a member or official of the Government to the effect that the capital stock had been increased by \$300,000, when in truth no such stock had been subscribed for or might ever be subscribed for.

It would be in truth a trap whereby persons relying upon the official statement, might be induced to credit the company, but who, when endeavoring to collect their debts, would find to their discomfiture that the statement was entirely baseless, the stock not having been increased, but a power only given to increase it.

To state my meaning in other words. The directors are assumed to know how much additional capital is required and they ask the shareholders to sanction it.

That accomplished there is provisionally authority to increase it and the law gives them six months to act upon it and solicit subscriptions; within that time their power to solicit subscriptions must be exercised, and they have necessarily to furnish to the Provincial Secretary the result of their endeavours, or he could not sign the notice in the form prescribed.

The judgment below treats this as if the words of the statute were "the amounts subscribed and the amounts paid in *if any*," but that is not the language, and when we look at the entire Act, which requires originally that a certain portion of the capital shall be subscribed and a certain portion paid up, and we then find that after the directors have obtained the authority of the shareholders to increase the capital to the amount which they say is required, that the Provincial Secretary is required to state in the notice how much is subscribed and how much paid up, it is a pretty clear indication that he was to exercise some discretion, and that a very small subscription might lead to the inference that there was no necessity for the increase and no prospect of the full amount being subscribed, and he might therefore decline to sign the notice.

If it was not for this purpose why resort to the meaningless form of having the notice over the signature of the Provincial Secretary when a notice signed by the secretary of the company would seem more appropriate and would answer every purpose?

Why provide for its being done within six months unless for the purpose of getting stock subscribed and satisfying the Government that the application for the increase is *bonâ fide*, and to provide against the power being kept in abeyance and unexercised for an unreasonable time?

If we consider the object with which the statute was passed, viz: to save the necessity and expense of applying

in every case to the Legislature for a charter of incorporation, but delegating the power to grant such charters to the executive under certain defined conditions, we can readily understand that the Legislature intended to confer upon the executive the same right to control the increase of capital which before the passing of this Act would have remained with themselves.

I have already pointed out that if this charter had been granted by Parliament, fixing the capital at a certain sum, it would not have been in the power of the company to increase it; they would have been under the necessity of resorting to the same power which granted the charter to allow the increase.

Does any one for a moment doubt that if this company had originally asked for a charter with a capital of \$500,000, that it would have been granted? it most assuredly would not, unless the applicants had satisfied the Government that \$250,000 had been *bonâ fide* subscribed, and \$25,000 paid in.

Read as I am proposing to read the clauses which relate to increasing the capital, the whole of the sections are brought into harmony, and indicate that the Legislature with a view to facilitating the incorporation of manufacturing companies, transferred the power to the Government but restricted them in the manner pointed out.

If then the corporation could not of its own mere motion increase its capital stock what has the Legislature substituted for the power which in the absence of an express provision in the charter it alone possessed? To my mind three things were necessary.

1st. A *bonâ fide* exercise of judgment on the part of the directors that an increase of capital was required and the introduction of a by-law for that purpose.

2nd. The assent of the shareholders in the manner pointed out in the Act, the whole of which had to be duly authenticated and filed with an officer of the government.

3rd. That the by-law had been acted upon within six months, by the subscription of stock in good faith, and

proof adduced to the Provincial Secretary so as to enable him to certify as the Act requires.

The language used in these sections may not be as clear as that employed in more recent enactments on the same subject by the Dominion and Ontario Legislatures, but when read in connection with the rest of the Act it is clear, to my mind at least, that the Provincial Secretary was not intended to fill the position merely of an office clerk and file or sign such papers as might be presented to him.

I think that the application to the Provincial Secretary was premature. It being shewn that the stock had not been allotted and subscribed for in whole or in part, and as this was not done within the six months required by law the Provincial Secretary was justified in declining to sign the notice presented to him.

I have already intimated that it is not for us to express any opinion as to the policy of the restriction. Subsequent legislation in our own Province, has been in favor of more liberality in the original incorporation, and more stringency in the increase of capital, whilst in England there is a tendency to greater facilities in the increase of the capital. What we have to decide is ; What was the meaning of this Act of Parliament passed at the time and under the circumstances in which it was passed ?

It is not necessary in this view of the case to decide the question of whether under this Act there can be more than one increase of the capital. I am myself not free from doubt, although I see no good reason why, as a matter of policy, it should be so confined.

The legislation was a departure from the previous practice, and in all special charters at and previous to it, we find that even where an increase was authorized it was not to go beyond a fixed limit. We find also in other portions of the Act, the Legislature using the words "from time to time," whereas when providing for the increase of capital, they use the words "*at any time*," not "any time or times ;" and it is to increase it to "*any amount*," not to "any amount which they may, from time to time, consider necessary."

Literally, therefore, it would seem to be confined to one exercise of the power, and whether that be the true construction or not, I certainly do not think that the language at the end of section 18, which is italicised above, gives any additional force to the words used as has been suggested.

As I read that portion of section 18, it was merely intended to place the new stock on the same footing as the original stock, as regards calls, transfers, dividends, the privilege of voting, and other such matters, but the right to increase was not an incident of the original stock; it was a separate, distinct and independent privilege, and has to be exercised in terms of the grant, whatever they may be.

For similar reasons I do not feel called upon to express any decided opinion as to the propriety of granting a mandamus, if we had the power to do so upon the uncontradicted facts before us on this application.

It is said the Courts are open to the dissatisfied minority of shareholders, notwithstanding the issue of the mandamus. That may or may not be so, and may possibly depend upon the ultimate decision of whether the duties of the Provincial Secretary are purely ministerial or not.

It would no doubt be contended in any proceeding on behalf of the shareholders, that the matter was one of purely internal regulation and that the Courts consequently would not interfere.

That would raise the question of whether the decision of the directors could under any circumstances be inquired into.

If, for instance, it could be shewn beyond all question that the increase was not required in order to carry out the objects of the company, but to squeeze out the smaller shareholders—and one can easily understand how easily that could be brought about by declining to declare dividends and making the stock therefore unmarketable—my present impression is that such a course not being a bona fide exercise of the discretion which the statute has vested in the directors, would be fraudulent and illegal. If

that be so the approval of that act by the majority of the shareholders would not validate it, and the Court would interfere at the suit of any dissentient shareholder and protect him and his interest, he having before applying to the Court endeavored to avail himself of all such extra judicial remedies as were open to him.

If then upon the same uncontradicted evidence as we find in this case, a Court would interfere, I should feel that we were not called upon to grant a mandamus to parties who have chosen to allow such statements to remain uncontradicted and think we have a right to accept those statements as true.

It certainly would not be indicative of any great progress in the way of legal reform if, with the knowledge that in the event of our granting a mandamus, the same question that is now before us might be presented by the dissatisfied minority and the action of directors restrained, we were to feel ourselves compelled to grant the writ, the only effect of which would be to change the forum to adjudicate upon it.

The directors having elected to stand upon their alleged legal rights, and refused to answer the affidavits, I should hesitate long before granting a mandamus upon such a state of facts; but for the reasons I have given I have not thought it necessary to give much attention to this branch of the case.

I think the appeal should be allowed and the order for the mandamus discharged, with costs.

Appeal dismissed with costs.

BURTON, J.A., *dissenting.*

[Since carried to the Supreme Court.]

WILKINS V. MCLEAN.

Mortgage—Equity of redemption—Pledgee of mortgage security—Collateral security.

The defendant M. had in his possession as executor of J. D. C. a mortgage of one R., which the agent of M. had deposited with H. as collateral security for moneys advanced to such agent, in all about \$400. Some years after M. executed an assignment of this mortgage to S. C. a legatee under the will for the alleged purpose of securing payment of her legacy; at the same time giving a personal covenant for the same object.

H. assuming to act as owner of such mortgage, wrote to the persons owning the equity of redemption, that he controlled the mortgage; that the lands were incumbered for more than their value, and suggesting that they should convey their right to him. This they did for \$30, by conveying to a trustee for H., and subsequently H. in consideration of \$500, obtained from S. C. an assignment of her interest in the R. mortgage, and also an assignment of the covenant of M.

H. subsequently sold these lands for an alleged consideration of \$5,000; accepting a conveyance of other lands, which he shortly afterwards sold for \$6,500 cash. The whole amount of H.'s claim, including the \$500 paid S. C., did not exceed \$1,500.

In a proceeding instituted by H. against M., this Court on appeal reversed the judgment of the Common Pleas Division, holding that notwithstanding H.'s dealings with the lands he was entitled to enforce payment of M.'s covenant.

THIS was an appeal by the plaintiffs from a judgment of the Common Pleas Division, overruling the judgment of Ferguson, J., pronounced in favor of the appellants, and directing the appellant Hime to account to the respondent for moneys received by the appellant upon the sale of certain lands and premises mentioned in the pleadings.

The action had been commenced by bill filed in the Court of Chancery before the coming into force of the Judicature Act, in the name of the appellant Wilkins against the respondent, to compel payment by the latter of a sum of \$2,050, which, by indenture dated the 8th of May, 1880, he had covenanted to pay to one Selina Cameron, and in default of payment that the interest of the respondent in a certain mortgage in the pleadings mentioned, which he had assigned to the said Selina Cameron as security for such indebtedness, might be foreclosed.

The respondent, by his answer, insisted that under the circumstances hereinafter stated the claim of \$2,050 was discharged.

The facts, shortly stated, were these: One Romaine mortgaged certain lots on Adelaide street, in the city of Toronto, to one J. D. Cameron, who died, having appointed the defendant his executor, the mortgage being then unsatisfied.

Romaine sold the equity of redemption in the premises to one Zimmerman, who also died, leaving Woodruff and Miller his executors, the mortgage remaining unpaid.

The mortgage had several years before been deposited with Hime as collateral security for money advanced to the defendant and to his brother, in all about \$400. The defendant, under the circumstances, disputed Hime's right to retain possession of the mortgage, and brought an action of detinue against him to obtain it, in which action a verdict was given in favor of Hime.

Subsequently, and on the 13th of December, 1877, Hime wrote to Woodruff saying that he controlled the mortgage; that the lands were incumbered by two outstanding mortgages for more than they were worth, and seeking to obtain a release of the equity of redemption.

Hime had been examined before the hearing, and in the course thereof the following evidence was elicited:

Q. And they [the executors] assented to that statement, and you got a deed from them of the equity of redemption? A. Yes; the deed was taken to Harris; there was no trust expressed, but he was my nominee; I think he conveyed it to Quinn at my instance, and Quinn conveyed it to Hope at my instance; Hope conveyed it to Mrs. Mackay. Q. Also at your instance? A. No, at his own instance; not by my direction. Q. Who had arranged the sale to Mrs. Mackay? A. I did; at the price of \$5,000: she paid it by giving another piece of property, which was worth \$5,000. Q. So that you got \$5,000 worth of property in consideration of the sale of this land to her? A. Yes; it must be two or three years ago when that sale to Mrs. Mackay was arranged; it wasn't before this letter A was written to the sheriff [Woodruff.] Q. What had Hope to do with the matter? A. He was trustee for Mrs. Mackay. Q. So that the conveyance was made to Hope as trustee for Mrs. Mackay? A. Yes. Q. In order to carry out a sale that you had made of these lands? A. Yes; in order to sell the lands to Mrs. Mackay. Q. In order to carry out a sale you had made to Mrs. Mackay? A. Yes; these conveyances were

made with that object ; I got this other land ; I have sold it for, I think, \$6,000 ; I made that sale only recently ; I have received the money. Q. How much was your interest in this mortgage at this time ? A. I couldn't exactly say. Q. Had you taken any proceeding to foreclose it in any way ? A. No ; I suppose there was about \$1,500 due. Q. Why did you represent to these executors that the lands were mortgaged for more than they were worth ? A. So they were ; there was a mortgage over them for £550. Q. When you say the property was mortgaged for more than it was worth, you allude to this mortgage in question ? A. Yes ; there was also another mortgage to Catharine Crookshank, made by Jarvis. I haven't got that mortgage ; * * I don't think I ever saw that mortgage. Q. Then you weren't dealing with regard to that property in this letter ? A. It isn't part of this property. Q. Have you the mortgage here as to which Mrs. Cameron filed the bill against you ? A. I think it is in Mr. Edgar's office ; I had no interest in this Jarvis mortgage ; my only interest was as pledgee of this mortgage to secure this debt of \$400. Q. And that you hold in pledge to secure a debt due by McLean ? A. Yes. Q. And after payment of the debt you were to hand back to McLean his mortgage ? A. Yes. Q. Have you handed to McLean the difference between the debt due and this \$6,000 ? A. No, I haven't. Q. You are quite willing to do it ? A. Not in the least. Q. Then you got the conveyance of the equity of redemption, representing yourself to be a mortgagee, and representing that the mortgages exceeded the value of the property, and you net out of that transaction about \$4,500 over and above your claim ? A. I don't know that you can say that is the result of it. Q. Your debt was originally \$400 ? A. Yes. Q. And by process of calculation you make it up to \$1,500 in 1877 ? A. Yes. Q. And at that time, on the 13th December, 1877, you represented that you controlled that mortgage, and you wrote to the executors in that character, and by that means you got a release of the equity of redemption ? A. I got a conveyance to Harris : it was for me. Q. And you net out of this transaction the difference between \$1,500 and \$6,000, for which you sold this land ? A. The difference between that and \$5,000. Q. That is the transaction at all events as far as you are concerned ? A. Yes. Q. Now, on being redeemed this debt, you are in a position to re-assign this mortgage ? A. Certainly. Q. And are you willing to give the mortgagee whose interests you are representing by this letter the benefit of the title you have got in it ? A. No, I am not. Q. You still claim you have the right to hold that, although you claim in that way ? A. Yes. Q. Who else did you approach with a view to get in outstanding rights in this character of mortgagee ? A. I think I approached Mr. Arnold ; he seemed to have an interest in it as owner ; I can't tell you how he came to get a title without seeing the abstract. * * Q. When did you see him in connection with this transaction ? A. It would be some time about the time those letters were written ; before the time they were written. Q. What did you agree to give him ? A. I didn't agree to give him anything. Q. What consideration was he to get for releasing his interest ? A. He was to get whatever it was worth ; he said he would do it, I

person dealing with him knows that he is applying the assets of the estate to a purpose wholly foreign to the trust, and a fortiori when he takes that asset from a stranger with a full knowledge that it was to secure his own debt, such a transaction could scarcely be upheld against legatees or others interested in the estate.

It is not material now to consider whether the conclusion arrived at in *McLean v. Hime* was or was not a correct one upon the facts in evidence in that case; it decided this, and this only as I understand the case, that an action of detinue for the deed was not maintainable.

Mr. Hime was no doubt advised, and advised correctly, that any attempt on his part to enforce that mortgage against the mortgagor or those interested by purchase from him must of necessity have failed.

It is wholly different from the case of an equitable mortgage created by the deposit of the title deeds of the estate as security for a loan of money by a party competent to give a mortgage of the legal estate. The equitable mortgagee can by a decree of foreclosure obtain as complete relief as if he had taken a mortgage of the legal estate.

It is unnecessary to hazard any opinion as to how far that doctrine applies in the case of the deposit of a mortgage security simply by the legal holder of it. It is sufficient to say that this is not a case of that nature. The deposit was not made by the party entitled to the mortgage. Here the appellant had not even a pledge in the proper sense of that term, no property whatever in the estate passed by that deposit; strictly speaking, no property even in the paper on which the mortgage was written, passed, and it amounted at most to a sort of equity to retain it as against the person with whose subsequent ratification or acquiescence, as the Court found, it had been deposited; a very naked kind of security it must be admitted.

This deposit was made in 1864; the action which established his right so to retain it was decided in 1876.

I shall put out of view at present Mr. McLean's transfer of this mortgage to Mrs. Cameron and the acquisition of it by Mr. Hime, but to make this statement clear and intelligible I will here mention that the former took place on the 8th May, 1880, the latter on the 9th day of October, 1880.

Mr. Hime having had his right to control this mortgage to the extent I have mentioned established, seems to have reflected in what way he could make his possession available, and he therefore took pains to ascertain who were the then holders of the equity of redemption, and the result of his inquiries was to find that the Zimmerman estate were really the holders, although their interest had in point of fact been sold to the Bank of Upper Canada under a *fi. fa.* against the executors of Zimmerman, but which sale had been declared by the Courts to be void.

He accordingly acquired their interests for a nominal consideration, and I see no ground whatever for doubting Mr. Hime's statement that what he represented to them was that he controlled the mortgage, and that the property was not worth the mortgage money, of which the parties satisfied themselves by a personal inspection of the mortgaged premises.

It may be, but of that the executors of Zimmerman were as capable of informing themselves as Mr. Hime, that the right of the mortgagee may have been barred by the Statute of Limitations; the right of suing upon the covenant probably was, but I gather from the evidence that the lots were not occupied, and for all we can see the mortgagee's right to the possession may still exist.

However that may be, Mr. Hime appears to have represented things as they really were, although it is possible that if he had not been the possessor of the mortgage the executors and trustees of the Zimmerman estate would not have conveyed to him.

But I fail to see how the respondent is affected by that act, or why he should derive any benefit from the moneys which the appellant has received from the sale to Mrs. McKay.

If a mortgagee obtains a title at a tax sale, or any other paramount title on the strength of his being mortgagee, and makes his interest a ground for being allowed to purchase, one can easily understand that he cannot as against the mortgagor set up that purchase against a claim for redemption.

That appears to be well established by the cases referred to, and is founded on reason and good sense, but how does such a state of things apply to the present case.

Neither has the case of *Grace v. MacDermott*, 13 Gr. 247, any application in my opinion to the present.

In that case a married woman had intended to convey her estate in the land, but by a mistake on the part of the conveyancer merely released her dower. The property was subsequently sub-divided, and passed into the possession of several parties who supposed they were getting a perfect title as mortgagees to the portions covered by their respective mortgages, and the defendant, MacDermott, subsequently acquired a mortgage on the whole, shortly after which he discovered the defect in the title.

No doubt he might have purchased; and the former owner, if inclined to be dishonest, might have sold the land again, but nothing of the kind occurred: she supposed and was led to believe when she for a nominal consideration executed a deed with the prescribed formalities to pass her estate to MacDermott, that she was doing so for the purpose of rectifying the defect in the former deed for the benefit of all concerned; it would have been a fraud on the part of the defendant under such circumstances to retain for his own benefit and without consideration, property which the former owner would never have conveyed to him except for the purpose of quieting the title of all the parties interested.

If in the present case the title of Mr. McLean as mortgagee had been defective, and the appellant had represented that he was mortgagee and had upon the faith of that representation got in a title paramount to Mr. McLean's, the cases would be analogous, and I do not for a moment

doubt that he might be compelled to convey the interest thus acquired, but this case is very different.

Whether the owners of the equity of redemption would or would not have released to the appellant in the absence of any representation by him is so far as this respondent is concerned perfectly immaterial, his rights are not affected by that act, his claim against the land in the event of his again becoming the owner of the mortgage is as good as ever, and for anything that appears upon the evidence here may be enforced.

We must not forget what this suit is. The respondent claims as derivative mortgagee. The assignment of the Romaine mortgage by way of mortgage by the respondent to Mrs. Cameron and by her to the appellant were subsequent to the transactions which I have referred to.

If Mrs. Cameron had not assigned but was seeking herself to enforce this claim I do not see what answer the respondent could have to the action, and it appears to me that the appellant is in no worse position; on payment of the amount secured by the derivative mortgage, the respondent would be entitled to a re-transfer of the original security in the same state in which it was when transferred to Mrs. Cameron, and this the appellant asserts his ability and willingness to do. In default of payment the defendant's claim to the Romaine mortgage would be barred.

As at present advised there would seem to be nothing to prevent the respondent enforcing the mortgage against the land; the acquiring of the land from the Zimmerman estate and the sale to Mrs. McKay seem to me to be *res inter alios actæ*, all subject to the mortgage if the right to enforce that mortgage still exists. If it has become barred the appellant is not responsible for that, but it appears to me to be premature to consider these questions in the absence of the principal party affected by them, the present owner of the equity of redemption.

In this suit I agree with my brother Ferguson that the respondent has offered no valid answer to the claim; and I

am of opinion that the decree appealed against should be reversed and the original decree restored.

PATTERSON, J. A., concurred.

OSLER, J. A.—In *Grace v. MacDermott*, 13 Gr. 247, the case was that the defendant and a number of other persons being interested in certain lands, the title to which was defective on a ground common to all of them, the defendant procured a deed thereof to be made to himself by the original owner upon the express representation and understanding and under the belief on her part that such deed was to enure to the benefit of and confirm the title of all parties who claimed under her first deed. The defendant afterwards asserted that he was entitled absolutely to the whole of the land, but was declared to be a trustee for the benefit of all persons interested on the ground that he could not set up the deed in fraud of the express purpose for which it had been made.

In *Kelly v. Macklem*, 14 Gr. 29, the defendant being a mortgagee of land which had been sold for taxes subsequent to the mortgage, bought it from the tax purchaser representing that he was interested in the land as mortgagee, putting that forward as a ground for being allowed to buy, and using the word "redemption" in speaking of his purchase. He was held to be precluded from setting up *against* the mortgagor a title as absolute purchaser, because having purchased as mortgagee, and having made his interest in the land as such a ground for being allowed to buy he could not set up a right to hold as if he had purchased from a stranger.

These cases which were relied upon by the respondent, and are referred to in the judgment below, appear to me with great respect not to afford a rule for the decision of the present case, from which in principle I think them quite distinguishable. They proceed upon a perfectly clear and intelligible application of the doctrine of constructive trusts. In the one case the defendant was

attempting to set up the deed in fraud of the purpose for which it had been executed, and in order to defeat the title of those for whose benefit as well as his own it had been given; and in the other, the defendant, being the holder of a limited interest as mortgagee had made his right to protect that interest the pretext for acquiring a title paramount to and destructive of his mortgagor's right to redeem.

The position of the parties here is very different; nothing that Hime has done impairs or was intended to impair the defendant's right to redeem.

To put the case in the most favorable way for him, Hime was his derivative or sub-mortgagee by deposit of the Romaine mortgage which the defendant held as surviving executor and devisee of J. D. Cameron, the mortgagee. While thus interested Hime bought the ground equity of redemption from the assignees of Romaine, the original mortgagor, and he has since resold it at a large profit. But the defendant's right to redeem his security on payment of the charges he has created upon it is not and cannot be opposed, and indeed the plaintiff with not less honesty than prudence submits to be redeemed on payment only of the subsequent charge in favor of Mrs. Cameron, of which he has procured an assignment to his trustee Wilkins, and on which the bill in this suit is filed. If the defendant pays off that charge the mortgage can be re-assigned to him; he is still, for anything we see to the contrary, in a position to foreclose the equity of redemption of the original mortgagor, the only equity Hime has been dealing with. Had he acquired McLean's equity of redemption in the course of some proceeding by which it was affected, using his position as mortgagee in order to do so, and had then denied McLean's right to redeem, the cases referred to would have had a closer application. And if the defendant, being executor and devisee of the mortgagee, had purchased the equity of redemption in his own name he would have held it as trustee for the estate: *Fosbrook v. Balguy*, 1 M. & K. 226, Sugd. V. & P. 709, 711. But inasmuch as the defendant's

right to redeem the plaintiff and to foreclose the assignee of the original mortgagor is not affected. in other words, as he still possesses all the right he ever had to enforce payment of the money due to him on his mortgage, I do not see on what principle he can charge Hime with the profits resulting from his dealing with the original equity of redemption. Hime, as his mortgagee or pledgee, occupied no fiduciary position towards him which would incapacitate him from acquiring that interest. Nor are the grounds on which the renewal of a lease by a mortgagee or mortgagor is held to enure to the benefit of all those interested in the old lease, applicable here, the defendant's title being independent of that which the plaintiff has acquired.

I do not think the plaintiff is shewn to have misrepresented his interest in any way when he bought from Zimmerman's executors, one of whom was a well known professional gentleman residing at St. Catharines, to whom the abstract of title seems to have been submitted, and who was unlikely to have been ignorant of the manner in which the plaintiff, as he said, "controlled the mortgage," viz., by deposit or pledge of the instrument for the sum lent thereon to the defendant and his agent. If there was any misrepresentation as to the value of the property or the amount of the incumbrances, which induced the executors to assign the equity of redemption, that is a matter between them and the plaintiff. The defendant cannot take advantage of it.

For these reasons I respectfully think the appeal should be allowed.

[Since carried to the Supreme Court.]

GREENIZEN V. BURNS.

Sole of goods—Payment by cash or promissory notes—Action for goods sold and delivered on failure to pay in either way—Jurisdiction—Statute of Frauds.

The plaintiff agreed to sell the defendant a piano for \$400, to be paid by notes at one and two years, with interest, with a rebate for cash. The piano was delivered at the defendant's residence, who after using it for some time objected to retain it, and refused to give the notes or pay the stipulated price. The plaintiff thereupon sued the defendant in the County Court, claiming the \$400 and interest. At the trial leave was given to strike out the words "with interest."

Held, that the amount was ascertained by the act of the parties, and that defendant having neglected to pay either by notes or cash the plaintiff was entitled to recover in an action for goods sold and delivered. The Statute of Frauds not having been pleaded nor any objection properly taken to the sufficiency of the delivery of the piano either at the trial or in the order nisi the Court without deciding that there had been a sufficient delivery held that the objection was not open to the defendant and refused to permit an amendment.

THIS was an appeal by the defendant from the County Court of Leeds and Grenville, and came on to be heard before this Court on the 7th September, 1886.* The facts giving rise to the action appear in the present judgment.

McCarthy, Q.C., for the appellant.

C. F. Fraser, Q.C., for the respondent.

November 4, 1886. The judgment of the Court was delivered by

PATTERSON, J. A.—The plaintiff in his statement of claim sets out that he sold and delivered a piano to the defendant, the price being \$400, to be paid either in cash or else by two promissory notes for \$200 each, at one and two years from date, with interest at seven per cent, to be made by the defendant jointly with his wife, or indorsed by her; and he claims \$400 and interest, or in the alternative damages for the non-delivery of the notes.

The defendant denies the allegations of the claim, which is the only defence he sets up, adding a counter-claim

* *Present*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

for storage of the piano, which he alleges he notified the plaintiff to take away from his house.

The questions submitted by the judge to the jury, with their answers thereto, were as follow :

1. Did Burns purchase the piano ? Yes.
2. If so, what was the price ? \$400.
3. If he purchased, with whom did he make the contract, Rockwell or Greenizen ? With Rockwell.
4. If the contract was made with Rockwell, was the latter at the time acting for Stevenson & Co. or for Greenizen ? For Greenizen.
5. Was the plan of business between Stevenson & Co. that the piano, if sold, should be considered as sold to Burns by Greenizen, and should be accounted for by Greenizen to Stevenson & Co., and if so, was Burns aware of it ? Yes.
6. Did Burns, after the piano had been placed in his house, say to Greenizen that he would settle with him, and would pay him, giving him notes or paying cash, and get an allowance of three per cent. for cash ? Yes.
7. Did Greenizen pay Stevenson & Co. for the piano ? Yes.
8. If so, when did he pay them ? During summer of 1884.

A verdict was entered and judgment given for the plaintiff for \$400, the learned judge noting at the trial that the plaintiff abandoned his claim to interest ; and afterwards, in disposing of a motion against the verdict and judgment, allowing an amendment by striking the claim for interest out of the statement of claim, as also the words "jointly with his wife, or indorsed by her."

A number of points were stated in the defendant's order nisi as objections. We need only notice those which are renewed as reasons of appeal :

1. That there was no sale of the piano by plaintiff to the defendant, and there was no evidence of any such sale, and upon the evidence given the third and fourth questions should not have been submitted to the jury.
2. That the answers to said third and fourth questions are not supported by, and are contrary to, the evidence.

3. If there was any contract for the purchase of the piano it was with Rockwell, as agent for Stevenson & Co., they being the owners of the piano at the time.

4. There is nothing in the present pleadings upon which plaintiff is entitled to any verdict or judgment upon the evidence given herein.

5. The plaintiff has made no such amendment as was asked for at the trial, and ought not now to be allowed to make it or get the benefit of it; and if such amendment had been made then it would not disclose any cause of action, because the alleged agreement was only a parol one, and was not to be performed within a year.

6. There was no evidence to support any such amendment.

7. If there was any sale of the piano it was one on credit, and the term of credit had not expired at the time of the commencement of this action.

8. The County Court has no jurisdiction in this case, if the action is for the price of the piano, in addition to the fact that the term of credit had not expired, the amount sued for being \$400 and interest, is in excess of the jurisdiction. If it is for breach of contract—either in not giving notes in pursuance of the alleged agreement, or in not giving notes in pursuance of the agreement mentioned in the proposed amendment—the amount is unliquidated, and exceeds the jurisdiction of the County Court.

For the appellant it was objected before us that the case was beyond the jurisdiction of the County Court, by reason of the claim for interest in addition to the price of \$400, if that amount was liquidated, and because the limit of \$200 applies to a claim for damages for not giving promissory notes.

If we take the jury's finding, we have a sale of a piano for \$400—that amount is a debt. In the old action of *assumpsit*, it would have been recoverable only under the name of damages, but in either case it would be an amount ascertained by the act of the parties in effecting the sale and purchase at that price.

Interest beyond the \$400 would be recoverable only as damages, and could not have been given in the County Court. The amendment was probably advisable in order to avoid the appearance of a claim in excess of the jurisdiction of the Court, and for that purpose may be said to have been necessary; but it was little more than a formality. The claim for damages beyond the jurisdiction is certainly not more serious than an actual assessment of such damages would have been, and that was held to be curable in times long before our present more liberal system was inaugurated. *Thomas v. Hilmer*, 4 U. C. R., 527.

Then it was objected that the sale was not supportable under the 17th section of the Statute of Frauds.

The statute was not pleaded, and although at the close of the plaintiff's case at the trial the objection was taken, it does not seem to have been renewed after the evidence adduced by the defendant was given.

The learned Judge's note is: "I tell the jury that if they find the facts as proved in favor of the plaintiff, there was a sufficient delivery under the Statute of Frauds." This is a little obscure, but having regard to the fact that the defendant had supplied evidence of the use of the piano at his house by his family, which was good evidence of actual acceptance for the jury to deal with, though no doubt met by other evidence of repudiation of the purchase; and to the Jury's finding that the defendant, after the piano was in his house, said he would pay for it; and to the absence of any reference to the statute in the order nisi or in the reasons of appeal, except as in the 5th reason where it is set up for a different purpose with which we are not now concerned; we must take it that no question of the 17th section is now open, or could properly be given effect to even if the statute were pleaded, and under the circumstances we certainly ought not now to allow the defendant to amend by setting it up.

The right of this plaintiff to sue is disputed on the ground that he sold the piano as agent for Stevenson & Co., but that has been effectually answered by Mr. Fraser

by shewing the interest which the plaintiff had in the sale in respect of his commission, and his direct responsibility to his principals whom he in fact paid for the piano.

The character of the sale, which the appellant contends was on credit and not for cash, depends, as far as we can deal with it, upon the same finding of the jury on which the question of jurisdiction turns. We must take it to have been a sale of the piano for \$400, which sum the defendant had the option of paying either in cash or by notes at one and two years with interest, there being some inducement to pay cash held out by the offer of a discount. But as he did not pay in either way, we see no valid objection to the action for goods sold and delivered and the recovery of the agreed price of \$400: *Bartholomew v. Marwick*, 15 C. B. N. S. 711; *Rugg v. Weir*, 16 C. B. N. S. 471.

The appeal is dismissed, with costs.

WICKSTEED V. MONRO.

Life insurance for benefit of child—Death of beneficiary in life time of insured—To whom insurance money belongs.

In 1868 M. effected a policy on his life for the benefit of his daughter, who intermarried with the plaintiff, and predeceased her father, having bequeathed her interest in such policy to the plaintiff (her executor) in trust for her only child. M.'s wife died, and in 1877, prior to the marriage of his daughter, he married the defendant. In 1884 M. died intestate, leaving the defendant, his widow and one child surviving, without making any other disposition of his life policy.

In an action instituted by the plaintiff against the defendant, the widow and administratrix of M., it was

Held, [affirming the judgment of FERGUSON, J.,] that the insurance money formed part of the personal estate of M., and as such was payable to the defendant.

THIS was an appeal by the plaintiff from the judgment of Ferguson, J., reported 10 O. R. 283, where the facts are clearly stated, and came on to be heard before this Court on the 10th of September, 1886.*

Mowat, Q.C., Attorney-General, for the appellant.

W. N. Miller Q.C., for the respondents.

November 4th, 1886. HAGARTY, C. J. O.—This assurance was effected expressly under the Act of 1865. I think the effect of that Act practically withdrawing a portion of a man's income or earnings from the demands of his creditors, was intended to provide for a wife or child on the contingency of the husband or parent dying in the life time of the object of his provision and thus depriving such object of the support or maintenance of the assured.

I am unable to look on it in any other light: the death of the intended beneficiary in the lifetime of the assured completely answered, in my opinion, the intention of the statute in enabling the parent to provide against the one contingency.

I think that the 4th section of the Act throws strong light on this view.

**Present*—HAGARTY, C. J. O., BURTON, PATTERSON and OSLER, JJ.A.

The father is allowed by the preceding section to apportion the amount insured as he may think proper, among wife and children, or to one or more of his children. Then section 4 declares that when it is stated in the policy that it is for the benefit of wife and children generally, or of children generally, &c., then the word children shall be held to mean all the children of the person whose life is insured living at the time of his death.

My brother Burton has pointed out some of the consequences of holding that here the daughter had a disposing power over this insurance pending her father's life.

I think it would be a defeating of the object of an insurance like this to regard it in any other light than contingent on the pre-decease of the assured.

I think we can decide this case wholly on the effect of the Act of 1865.

The Ontario Act of 1869, ch. 33, evidently follows the same lines, and (as I read it) on the assumption by the legislature of the contingent nature of the interest of the person intended to be benefited, and the 6th clause, if it be applied to existing insurances, would place the matter beyond doubt.

If it were necessary for the decision of this case to refer to this last Act, I would require to consider very carefully whether this 6th clause does or does not refer to any and every insurance under the Act of 1865.

I think the appeal must be dismissed.

BURTON, J. A.—The policy in this case was effected in 1868, under the Act of the old Province of Canada, entitled "An Act to secure to Wives and Children the benefit of Assurance on the lives of their Husbands and Parents," and was granted to the late Alexander Maitland Munro upon his own life for the benefit of his daughter, Helen Mary Munro.

The contract of the company is to pay for the benefit of the daughter the sum assured within a certain time after satisfactory proof of the death of the assured—followed by

a proviso that the payment of the moneys due on the policy to the executors of the assured should be a valid payment and discharge the company.

Helen Mary Munro married the plaintiff, and died before the assured, bequeathing her interest in the policy to her husband, the plaintiff.

The assured married again, and died in 1884 intestate, and his widow has administered and the contest is between the representative of the deceased daughter and the representative of the assured.

The learned Attorney-General on the part of the representative of the daughter contended that the case must be considered in the same way as if an insurance had been effected by the father and assigned to or for the benefit of his daughter; in which case I apprehend his contention could not be successfully combated that she would have taken a vested interest in the policy and the moneys secured by it, and could have assigned it or bequeathed it by her will.

I feel great difficulty in so treating it. The provisions of this statute interfere to a great extent with the rights of creditors, and look to a provision for the widow and children of the assured, so secured as to be not only free from his control, but also from the claims of his creditors: this would seem entirely opposed to the idea that the wife or child could sell or traffic with the security which the assured himself had intended as a provision in the event of his decease.

If the assured had by the policy itself appointed the money to be paid to his daughter if living, but in the event of her death to her husband or her children, it is clear that as regards creditors such a limitation would have been void as not being within the terms of the statute. Must it not also follow that the daughter having died in his lifetime could not by any act of her own transmit an interest which he could not have created, so as to be valid against creditors?

I am not at all disputing that he could have assigned the policy absolutely to her, or have provided in the event of her death for its going over for the benefit of other parties named, but what we are dealing with is a policy effected under this statute, and I think its object and intent were to enable the husband or father to interfere to a certain extent with the rights of creditors so as to make provision either for the wife or children or both, to take effect after the death of the assured; and that this object would be defeated if the wife or child could assign their interest in the policy as in an ordinary chose in action, and it would open the door to the practising of frauds by enabling the beneficiary to assign the policies and pay over the proceeds to the assured thus abstracting, it may be, large sums from the creditors and defeating the object the legislature had in view when permitting the money to be applied for this humane purpose.

The case *Swan v. Snow*, in 11 *Allen*, 224, referred to by the Attorney-General, goes merely to shew that where a policy has been effected by or for the benefit of a married woman in the State of Massachusetts, her children will be entitled, in the event of her dying in her husband's lifetime, under the words of a statute which provides that where such a policy has been effected, it shall enure to her separate use and that of her children independently of her husband or his creditors or any other person.

Section 4 of our Act indicates that where children are named, generally, the intention is to confine the benefit of the insurance to the children living at the time of the decease of the assured.

The case referred to of *Burroughs v. The State Mutual Ins. Co.*, 97 Mass., 359 is rather in favor of the defendant's contention. There a policy effected by the husband for the benefit of his wife and children, was assigned by the husband with the consent of the wife to the plaintiff, and assented to by the company. By the law of the State, such an assignment vested the legal title in the plaintiff, who was

held entitled to recover, although it was said he would hold the proceeds in trust for a child of the assured. But it was said by the Court "if the assured had afterwards died leaving no wife or child surviving, the assignment would have entitled the assignee to recover the whole amount of the policies to his own use."

I understand the learned Judge below to have leaned to the opinion that, even under the statute of 1865, the daughter's claim was contingent upon her surviving her father, but held that the subsequent legislation applied and placed the matter beyond question. As I agree in the view that under the original Act her claim was a contingent one only, I express no opinion upon the construction of the subsequent statutes, but I think the appeal should be dismissed and the judgment affirmed.

No amendment was asked for in the event of the demurrer being allowed so as to enable the plaintiff to claim a lien for the premiums apparently paid by him, and I assume from the way the case is presented to us there is some agreement between the parties as to them.

OSLER, J. A.—The question argued on this appeal was chiefly whether the sixth section of 33 Vict. ch. 21, (O.) passed in 1869, in amendment of 29 Vict. ch. 17. could be read retrospectively, so as to apply to the policy sued on, which had been issued in the previous year.

Without the aid of that section, however, the original Act itself is, I think, fatal to the plaintiff's contention.

The effect of that Act was to enable a man by means of a policy of insurance on his life to make a sort of post-nuptial settlement upon his wife and children, which should be free from the claims of his creditors, whose common law and statutory rights against their debtor are superseded so far as may be necessary to give effect to the Act, but no further.

The right to procure or to assign a policy in any other way allowed by law was not restricted or interfered with.

It may still be assigned or settled upon any limitations or trusts which the insured thinks proper, subject to the ordinary rules of law applicable to such a transfer, and to the consequences flowing therefrom, which as regards the devolution of interest are widely different from those which attach to the statutory settlement. The question here is, whether anyone is entitled to the benefit of this statutory settlement, except the very persons named in the Act. In other words, whether a policy, effected for the benefit of a child who does not survive the insured, vests in him during the life of his parent, so as to pass to his assignees or to his legal representatives, at his death. I think the proper construction of the Act requires this question to be answered in the negative.

It is manifest that any other construction would go far to defeat the object of the Act which, I take it, was to make for the individuals or classes specified in the first section, a provision at the death of the insured. It can have been no part of the design of the legislature to enable a man to vest in his wife and children property which they could dispose of and realise during his lifetime, and which, though inaccessible to *his* creditors, would thus, during his lifetime, be available to theirs. The class of persons for whose benefit the insurance may be effected is strictly defined, but if they acquire interests transmissible during the insured's lifetime, he may continue after their death to withdraw his property from his creditors for the benefit of his grandchildren, or other persons not within the scope of the Act.

The fourth section of the Act, though it has no immediate application to the case before us, and is not very clearly expressed, does, nevertheless, strongly indicate that representatives of deceased children, are not intended to share in the policy.

It provides, first, that where no apportionment is made by the insured in the policy, all parties interested in the insurance shall be held (*sic*) to share equally therein: and secondly, that when it is stated in the policy that the in-

surance is for the benefit of children generally, without specifying their names, then the word "children" shall mean all the children of the insured living at the time of his death.

In the last case there is an express declaration of the meaning of the Act. In the case implied in the section, of a policy for the benefit of named children, but not apportioned among them, they, if they survive the insured, are the parties interested. But if one or more of them die, living the insured, are their children or devisees or other representatives, parties interested and entitled to share equally with the survivors? That cannot have been the intention. The meaning, as I think, evidently is, that the survivors alone in that case become the parties interested, taking the whole to the exclusion of the representatives of the deceased child or children, whether descendants or devisees or other children of the insured not named in the policy.

If "children" generally, mean those living at the time of the death of the insured, and "children" nominatim, mean those named or the survivors of them, it seems difficult to suggest a sound reason for holding that a policy in favor of one child is to receive a wider construction, so as to give a larger interest or more extensive power of disposition than is enjoyed in other cases. Where there are no survivors of several specified children, or where (in the case of a policy for the benefit of children generally) none are living at the death of the insured, the obvious result is that there are no beneficiaries in whose favor the policy can operate; and the same result, I think, must follow where the policy is for the benefit of one child only who is outlived by the assured; for where there is but one survivor of several named children who will take the whole if he also survives the insured, yet the fact that he is the last survivor of his co-beneficiaries cannot enlarge his interest so as to make it, what it was not before, a transmissible one during his father's lifetime. There are other considerations leading to the same conclu-

sion which I need not elaborate, such as that there is no actual transfer of the policy, and that the insured is not bound to keep it up, but may surrender it for his own benefit.

The cases which have arisen upon the statute are few. I may notice one, that of *Campbell v. The National Insurance Co.*, 34 U. C. R. p. 35. The point decided was, that each beneficiary might bring a several action for his own share of the insurance: Morrison, J., observes that the interest of the beneficiary may be assigned, but that observation must be taken to be limited to the case of an assignment after the death of the insured, or to refer to the peculiar form of the policy in that case, which was expressed to be for the benefit of the four persons named therein, if living, otherwise to their representatives or assigns.

For the foregoing reasons, depending upon what seems to me the proper construction of the Act of 1865, I think the appeal should be dismissed. I gather from my brother Ferguson's judgment that he probably took a similar view, though he preferred to rest his decision upon the Act of 1869.

The case appears to be one of great hardship as regards the plaintiff, whose wife, the daughter of the insured and the intended beneficiary, herself kept the policy on foot by paying the premiums which her father was unable to pay.

I think the action and appeal might well be dismissed, without costs.

PATTERSON, J. A., concurred.

Appeal dismissed, with costs.

BADGLEY V. DICKSON.

Building owner and contractor—Architect—Arbitrator—Neglect—Unskilfulness.

Although an architect, employed by the owner, for reward to superintend the construction of a house may, as between the latter and the contractor by the terms of their own agreement be in the position of an arbitrator and his decision as between them unimpeachable except for fraud or dishonesty, yet as between himself and his employer he is answerable for either negligence or unskilfulness in the performance of his duty as architect.

Irving v Morrison, 27 C. P. 242 approved.

THIS was an appeal from the judgment of the Queen's Bench Division pronounced 19th November, 1885, dismissing the defendant's motion for an order to set aside the judgment directed to be entered at the trial, and to direct a new trial between the parties.

The case was tried at the sittings at St. Catharines, before Rose, J., without a jury, on the 8th October, 1885. The action was brought to recover an alleged balance of commission due to the plaintiff from the defendant for his services as architect in superintending the erection of the defendant's residence on the bank of the Niagara river, in the county of Lincoln.

Judgment was given for the plaintiff for \$260 without costs.

From that decision the defendant appealed to the Queen's Bench Divisional Court. The two learned Judges of that Court who heard the appeal differed in their opinions, and the result was that the defendant's application was dismissed, but, under the circumstances, without costs.

The other facts appear in the present judgment.

The appeal came on to be heard on the 10th November, 1886.*

W. Cassels, Q. C., for the appellant.

McClive, for the respondent.

**Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER JJ.

The following authorities in addition to those mentioned in the judgment were cited : *Shiells v. Blackburne*, 1 H. Bl. 158 ; *Hamilton Provident and Loan Society v. Bell*, 29 Gr. 203 ; *Canada Landed Credit Co. v. Thompson*, 8 A. R. 696 ; *Harmer v. Cornelius*, 5 C. B. N. S. 236 ; *Turner v. Goulden*, L. R. 9 C. P. 57 ; *Re Hopper*, L. R. 2 Q. B. 367 ; *Ranger v. Great Western R. W. Co.*, 5 H. L. Cas. 72.

December 23, 1886. OSLER, J. A.—This is an appeal from the judgment of a Divisional Court of the Queen's Bench Division upon the defendant's motion for a new trial. The Court was composed of two Judges who differed in opinion the result being that the motion was dismissed and the judgment at the trial stood affirmed.

The action was tried before Mr. Justice Rose, without a jury, at St. Catharines. The plaintiff had judgment for the full amount of his demand and the counter claim was dismissed.

The plaintiff was an architect and sued for the balance due to him under an agreement with the defendant for commission for his services in superintending the construction of a dwelling house. His claim was resisted and damages also demanded upon the counter claim, on the ground that by his negligence and want of care and skill in the performance of the duty he had been retained and had undertaken to do, the contractor's work had been done in a defective and inferior manner as regards the construction of the building and the quality of the materials.

The plaintiff contended that by the terms of the contract between the building owner, (the defendant) and the contractor, he had been made the authorized judge of the quality of the material used and of the time and manner of executing the works, and the person to whose satisfaction they were to be performed, and therefore occupied the position of arbitrator between the parties, and that having approved of the work and certified to its due performance so as to entitle the contractor to be paid under

the terms of the contract, no action would lie against him ; nor was his own claim for commission under his agreement with the owner subject to reduction by reason of any negligence and want of care or skill on his part as architect.

The learned Judge ruled in accordance with this contention, and rejected the evidence offered in support of the defence and counter claim, as will be seen by the following extract from the report of the trial :

HIS LORDSHIP.—“ On what principle are you tendering this evidence ?

Mr. Cox.—That this work was done either when he was not there, or else he didn't exercise his judgment about it at all.

HIS LORDSHIP.—That is negligence.

Mr. Cox.—Yes, gross negligence. He didn't exercise any judgment about it at all.

HIS LORDSHIP.—Its being done knowingly or negligently would not found a cause of action. It was not his duty to do the work, but it was his duty to supervise and certify.

Mr. Cox.—Though it was not his duty to do the work, he had certain work to do in addition to certifying. It was his business to go there and see the men did their work properly. Our damage is not merely by paying too much on the certificate, but we have a house there that we say is a continual eye-sore to us.

HIS LORDSHIP.—I am prepared to rule you cannot recover any damages from the architect for any loss you have sustained in having a poor building, without fraud. The only question that you can shew is, that he has not done the work for which he charged, that is all. The case is exactly the same as one in which there is an arbitrator. I have always thought the position of an arbitrator is a most absurd one. He has powers given to him that are given to no other being in the world, and it results in hard feeling and litigation ; but the parties, if they choose to enter into such a contract, must abide by it. Having put him in the position of sole arbitrator, they have to shew, if they want to hold him liable, not that he had exercised a very poor judgment, or that he is unskilful, but that he has been dishonest and fraudulent. * * * If you can shew me he didn't do the work for which he has charged,

he cannot recover. If you shew he did it negligently, I am afraid you have no action."

The present case is in my opinion broadly distinguishable from those relied upon by the plaintiff in support of this ruling. The principle affirmed or established by those cases is, that it is not consistent with public policy that an action should lie against an arbitrator or quasi arbitrator, whose functions are of a judicial nature for negligence or want of skill in the performance of his duty as such. The justice and expediency of such a rule is manifest. When two parties agree to be bound by the decision of a third party on a matter in dispute between them, or upon which a liability is to arise on the part of one of them, they take him as it is said for better or worse, and there is no implied obligation on his part to bring any particular amount of care or skill to the performance of the duty if he undertakes it. All that is required of him is, that he shall act honestly and faithfully to the best of his judgment.

I will briefly refer to three of the principal cases on the subject. The first is *Pappa v. Rose*, L. R. 7 C. P. 32, 525. There the defendant had been employed by the plaintiff as a broker to sell certain raisins, and he made a contract of sale between the plaintiff and another person.

The sale note provided that the selling broker was to decide upon the quality of the raisins tendered in fulfilment of the contract, and the defendant acting under that stipulation, determined that they were not of such a quality as to satisfy the contract.

An action was brought against him for not having exercised reasonable skill and care in coming to a decision, and it was held, first in the Court of Common Pleas and afterwards in the Exchequer Chamber, that he was not liable; it being conceded that he had acted *bonâ fide*, and to the best of his judgment.

"As the broker employed to make the contract, he was bound to exercise ordinary care and skill, but when he became the person who was to determine the dispute as to the quality of the raisins he was a person filling

a position which brought him within an exception well known to the law of England, viz., that a person who is appointed and is acting as an arbitrator to determine a matter in difference between two or more persons does not enter into an implied promise to bring to the performance of the duty entrusted to him a due and reasonable amount of skill and knowledge. The question is one of implied undertaking and the law says there is none such." Brett, J., p. 40.

In *Tharsis Sulphur and Copper Co. v. Loftus*, L. R. 8 C. P. 1, the defendant was an average adjuster, to whom the plaintiffs, (owners of the cargo), and the shipowner, respectively, had agreed to refer the question of the proportion of a general average loss which the ship and cargo ought respectively to bear.

The action was for not exercising due care in the performance of the duty as average adjuster.

It was held that the principle on which *Pappa v. Rose*, was decided applied, and that he was not liable.

Stevenson v. Watson, 4 C. P. D. 148, was an action by the contractor under a building contract against the architect of the building owners for not using due care and skill in measuring quantities and ascertaining the amount to be paid by the owners, and for negligently certifying for a much less sum than the balance due to the plaintiff.

The contract, (to which the architect was not a party) substantially provided, as in the present case, that the contractor and the owners, should be bound to leave all questions or matters in dispute which might arise during the progress of the works to the architect, whose decision would be final and binding upon all parties, and that the contractor would be paid upon the certificate of the architect.

In this case, also, it was held that the defendant was not liable on the ground, as stated by Lord Coleridge, C. J., that it was within the authority of the cases which decide "that where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a seller and buyer, and in the opinion of the seller that judgment has been exercised wrongly, or improperly,

or negligently, or ignorantly, an action will not lie against the person put in that position where such judgment has been wrongly, or improperly, or ignorantly, or negligently exercised."

It was pointed out that there was no direct contract between the plaintiff and the defendant, and Denman, J., said that it appeared to him that the defendant did not by undertaking the office of arbitrator, undertake any duty amounting to more than that of honestly performing his functions.

In all these cases, and others which might be cited of a similar nature, it will be seen that the action was against the arbitrator, founded upon the breach of a supposed implied undertaking to perform his duty as such with an ordinary degree of care and skill, and the action failed because no such undertaking was implied by law, and there was no contract, express or implied, between the parties out of which any other duty or liability could arise.

In the case before us the action and counter-claim are based upon a distinct contract, by which the plaintiff was employed as a skilled professional person to perform certain services for reward, and he is not, in my opinion, absolved from the usual obligations attaching to such a contract merely because under another contract between his employer and the builder, he may as arbitrator have determined between them as to the performance of that contract, in a manner which assumes that he has properly performed his own.

That the architect has placed himself in a position which may prevent him from giving an impartial, unbiased decision, might under certain circumstances be a reason for holding that the builder, if he was ignorant of it, was not bound by the arbitration clause; but while, as between themselves, the employer and the builder, if there has been no concealment of the architect's position, may be bound by his decision, that decision can never conclude or satisfy the obligations arising out of the architect's own contract. *Kinberley v. Dick*, L. R. 13 Eq. 1.

The case of *Irving v. Morrison*. 27 C. P. 242, so far as we can judge from the report, is not unlike ours. There the plaintiff, an architect, sued for his fees and commission for drawing plans and specifications and superintending the erection of a house for the defendant. The plaintiff had, in fact, given certificates to the builder greatly in excess of the proportion stipulated for by the contract, and the builder having subsequently failed, the defendant was compelled to have the work done by others at a higher price. It was held that he was entitled to deduct from the amount which would have been due to the plaintiff the loss sustained by the latter's negligence in certifying for too much. The terms of the building contract are not stated in the report, though it is probable that they were the usual ones, similar to those in the present case.

The case was fully argued, but it does not appear to have been suggested that the plaintiff's position as arbitrator exempted him from responsibility for negligence under his own agreement with the defendant.

It is said to be an anomaly that while the plaintiff cannot be sued in his character of arbitrator or quasi arbitrator he may yet be liable for a loss occasioned by his want of skill or want of care in another form of action. The answer simply is that he has entered into a contract which makes him so.

It would be an extraordinary result if we were obliged to hold that the contract which the building owner makes with the architect for his own protection, is neutralised by, or inconsistent, with a provision introduced into a different contract between the owner and the builder for the purpose of preventing or settling disputes as between themselves. As architect he is in the same position as any other professional or skilled person, and whether it be in the preparation of plans and specifications or the doing of any other professional work for reward, is responsible if he omits to do it with an ordinary and reasonable degree of care and skill.

I think, therefore, that the defendant's order nisi for a new trial in the Court below should have been made absolute, and that this appeal should be allowed.

HAGARTY, C. J. O., BURTON and PATTERSON, JJ. A.,
concurred.

REID V. GOWANS.

Creditors Relief Act—43 Vict. ch. 10 (O.)—Interpleader issue—Subsequent execution.

The plaintiffs obtained execution against one D. under which a seizure was made, when the defendant and another party made claim to the goods under a chattel mortgage, in consequence of which the usual interpleader order was issued, and default having been made in payment into Court or giving security for the appraised value of the goods, the same were sold and the proceeds paid into Court. The trial of the issue resulted in favor of the claimants, but on appeal the claim of the defendants was disallowed, and the demand of the other claimant was paid. Before the trial took place the defendants placed an execution for the amount of their demand in the sheriff's hands against the goods of D.

When finally disposing of the matter the Judge of the County Court directed that the money in Court should, after payment of certain costs, be paid out to the plaintiffs and defendants ratably according to their respective claims under the Creditors' Relief Act, 43 Vict. ch. 10, (O).

The plaintiffs thereupon appealed, and on the hearing, the Court being equally divided, the appeal was dismissed, with costs.

Per PATTERSON and OSLER, JJ. A. The moneys were properly distributable under the Statute.

Per HAGARTY, C.J.O., and BURTON, J.A. These moneys were not moneys "made or levied under execution," and therefore did not come within the provisions of the Act.

THIS was an appeal from an order of Lazier, Judge of the County Court of the county of Hastings, made in an interpleader matter under the following circumstances:

Under an execution against one Davis, issued at the suit of W. J. Reid & Co., the Sheriff of Hastings seized certain goods to which claims were made by Messrs. Gowans, Kent & Co., and by five other claimants; and thereupon the usual

interpleader order was made. The goods, in default of payment or security, were sold, and the proceeds paid into Court. In the issue directed Reid & Co., as against Gowans, Kent & Co., finally succeeded; the claims of all the other claimants having been disposed of by different orders.

Reid & Co. thereupon applied for payment out of Court to them of the balance of the moneys paid in to be applied on their execution. Gowans, Kent & Co. had in the meantime placed an execution of their own against Davis in the Sheriff's hands, and the learned Judge ordered the funds in Court to be distributed upon both executions ratably between the parties.

From this order Reid & Co. appealed and the appeal came on to be heard on the 9th of September, 1886.*

Gibbons, for the appellant.

The position taken by the appellants is, that the moneys, the subject of the order appealed from, were not made by the sheriff under an execution, but were made under an order of Court—that is the interpleader order—and cannot, therefore, be subject to the provisions of the Creditors Relief Act. That Act, we contend, refers *only* to moneys made under execution.

At the time of the motion by the sheriff for the interpleader order, the respondents were not execution creditors, but claimed simply as mortgagees, and in that capacity it was that the issue between them and the appellants was directed to be tried. Their execution was subsequently obtained; all execution creditors other than the appellants had abandoned. The money realised by sale of the goods was, by the terms of the interpleader order, to abide the result of that issue; and the issue as between appellants and respondents having been decided in favor of the appellants, they are entitled to payment of the fund.

Suppose the respondents, instead of allowing the goods to be sold, had, in the terms of the order deposited the value or given a bond to pay the appellants' judgment, in

**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, AND OSLER, JJ.A.

such case they would not be heard to object to the payment of the appellants' claim on their succeeding. If they could, so also could the creditors claim to share who had abandoned.

The form of the interpleader order, and of the issue therein directed to be tried (that is: "whether at the time of the seizure by the sheriff the goods seized were the property of the claimants as against the execution creditors") precludes the possibility of the respondents being entitled to share in the proceeds of these goods under a right or title subsequently acquired.

The effect of allowing the contention of the respondents to prevail, would be to place the appellants, who had to pay the costs of other claimants who succeeded on the issue, in a worse position than if they had abandoned all claim to the goods under their execution.

It is shewn that the appellants have been compelled to pay the costs of other claimants and if the respondents should now succeed in their contention, the appellants would be in a worse position than if they had abandoned all claim under their execution.

D. Henderson, for the respondents.

The interpleader proceedings were taken simply for the purpose of trying the title of the respondents to the goods under their chattel mortgage. This they endeavoured to establish but failed in doing so, and had in consequence to pay the appellants the costs of that litigation. There was no ground for saying that the respondents could not pursue either or both of their remedies in order to enforce their claim.

Here the sheriff has treated the money realised as being subject to the provisions of the Creditors' Relief Act, 43 Vict. ch. 10, (O.) by posting up the notices required to be given by the sheriff in proceeding under that Act. The Court will always lean towards an equal distribution amongst creditors of money when paid into Court under any proceeding.

He referred to *Levy v. Davis*, in Chambers, (not reported); *Dawson v. Moffatt*, 11 P. R. 484, and *Barker v. Leeson*, 1 O. R. 114.

November 4, 1886. HAGARTY, C. J. O.—This was an appeal from the County Court of Hastings. On the 17th of January, 1885, plaintiffs issued execution against one Davis. The sheriff seized, and the defendants and one Darling claimed under a chattel mortgage, and the sheriff applied for interpleader, and an order was made on the 13th March, 1885. The usual order directed that upon payment into Court of the appraised value, or satisfactory security being given by the claimants, the sheriff should withdraw—unless payment or security, then sheriff to sell and pay proceeds into Court to abide further order.

Default was made in payment or security, and the sheriff sold on the 20th March, 1885. Under the order the claimants and execution plaintiffs proceeded to try the issue. At the trial both claimants succeeded.

The present plaintiffs appealed to this Court from the verdict and succeeded in reversing the decision as to them. This was on October 14th, 1885.

The plaintiffs paid the other claimant, Darling, who succeeded, the costs of the issue, and he was also paid his claim, as is sworn, by an order of 7th October, 1885, on the sheriff to pay him the amount.

On the 15th June, 1885, the case was tried at Belleville.

On the 11th April, 1885, before said trial, defendants Gowans placed their execution in the sheriff's hands against Davis.

In the final disposition of the case by order of 24th February, 1886, the learned Judge of the County Court directed in effect that the balance of the money in Court after payment of certain costs should be paid ratably to the plaintiffs and to the defendants in proportion to the respective amounts of their executions.

The plaintiffs appeal, and the whole question is whether the defendants' execution issued after the interpleader

order, sale of goods and payment into Court, and before trial of the interpleader issue, shall share with the plaintiffs in the money.

The question arises on the Creditors' Relief Act of 1880, 43 Vict. ch. 10 (O.)

Section 5 directs that in case the sheriff levies money upon an execution, he shall forthwith enter in a book open to the public, a notice stating that a levy has been made, and its amount, and such money shall be thereafter distributed ratably among all execution and other creditors whose writs &c., were in the sheriff's hands at the time of such levy, or who shall deliver their writs to the sheriff within one month from the entry of such notice.

2. The said notice shall state the day on which it is entered, and may be in the form given in the schedule.

3. If after such entry of notice, but within the month, the sheriff make further levy, the same shall be dealt with as if levied prior to the entry of such notice, but if after the month any further amount be levied, a new notice shall be entered, and the distribution to be made of the amount so levied, and of any further amount levied within a month of the entry of last mentioned notice, shall be governed by the entry of such last mentioned notice under these provisions.

The Act gives the form of notice. It announces that he has levied a named amount and that this notice is first posted in his office on the day of , and that distribution of said money will be made amongst the creditors, &c., at the expiration of one month from that day.

Last session another clause was directed to be added to this Act, 49 Vict. ch. 10, sec. 37 (O.):

"When there is in any Court a fund belonging to an execution debtor, or to which he is entitled, the same or a sufficient part thereof to meet the claims in the sheriff's hands may, on application of the sheriff or party interested, be paid over to the sheriff and shall be deemed to be money levied under execution within the meaning of this Act."

The point for decision must be whether the defendants are entitled under the provisions of this statute to share in this fund. We must see how the case can come under it.

The statute struck a powerful blow at the long established rights of execution creditors, practically destroying the old priority as to all executions issuing within one month.

It must, I think, be made to appear beyond reasonable doubt that it comes within the special provisions which are aimed at the abrogation of a very old right,

I am not in any way disposed to extend its operation beyond its own clear language. Nor do I see the force of any argument based on what is called the "equity of the statute."

I can understand the view taken by our Chancery Division in *Dawson v. Moffatt*, 11 O. R. 487, that where a long established rule of Equity Courts of applying a fund in Court towards payment of execution creditors, by what is termed, as it were, equitable execution, should be modified to suit the spirit of recent legislation, and instead of allowing the first come to be first served, to administer the equitable relief on the basis of the equality, now practically provided by the Legislature.

But the case before us does not, in my judgment, fall within any such principle.

In the first place, has the money in this case been made or levied on an execution? In my judgment it has not, and if not, it does not come within the Act.

The sheriff has seized. The goods are then claimed by two parties in different rights. Under the interpleader order the claimants could have given security and the goods would have been restored to the execution debtor, or they could have paid the value into Court.

In such event the present defendants would have no claim whatever, and *as to them*, the money, if paid into Court, would have been applied by the Court to pay the plaintiffs' execution—on the principle of such cases as *Murray v. Arnold*, 3 B. & S. 287; *Culverhouse v. Wilkins*,

L. R. 3 C. P. 295, cited by the learned Master in Chambers in his judgment in *Levy v. Davis*, of which a copy has been handed in to us.

Here the sheriff, by order of the Court sells the goods seized and pays, as ordered, the proceeds into Court.

The issue is directed to be tried, and two months before the trial, though within the month from the issue of the first execution, the defendants issue their execution, as I understand, for the same debt for which they claimed to hold the goods.

I hold that this money was not levied upon an execution, as being the execution debtor's goods "under and by virtue of the execution, and for the purpose of executing the writ." These latter words are used by the Court of Common Pleas in an instructive judgment in *Clarke v. Farrell* 31 C. P. (at p. 595), by my brother Osler.

I fully agree with the view expressed by the Judges in *Clarke v. Farrell*, that it was not a sale on the execution, but under the order of the Court.

White v. Binstead, 13 C. B. 307, cited in my learned brother Cameron's judgment may be noticed.

Goods were seized and claimed by another. The landlord also claimed for rent due. The sheriff sold the goods under the order, paid the landlord's rent, and the balance into Court. At the trial of the issue the claimant recovered and the money in Court was ordered to be paid to him, and also that the sheriff should pay him the amount paid to the landlord. On appeal to the full Court this order was upheld. Jervis, C. J., says: "Until the issue was determined it was uncertain whether execution was executed or not—for if it turned out that the sheriff had seized the goods of a third person, there was no execution to justify them in selling them, or to entitle the landlord to the rent. After the interpleader order, the landlord made his claim for rent. It is unnecessary to say how the matter would have stood if the sheriff had obeyed the interpleader order and brought all the money into Court."

It seems clear, therefore, that though the goods be sold under the order, the question whether the execution has been executed in fact on the defendant's goods must remain contingent on the result of the issue.

In this case there were two claimants by mortgage; Darling first and the defendants second.

The first claim succeeded, and Darling had to be paid out of the fund. All this points to the correctness of the opinion that the sale under the order is to abide the event, and cannot be considered a sale and making of the money under the execution.

I have read with care the well considered judgment of the learned Master in *Levy v. Davis*, but am unable to agree in the result arrived at.

The Act of last session may perhaps meet the supposed failure in the statute to reach a fund in Court, if it be held that money paid in by the sheriff on the sale of goods under the order is to be considered "a fund belonging to an execution debtor, or to which he is entitled" until or unless the property had been changed by sale on execution.

Goods seized by the sheriff are regarded as the debtor's goods until the sale and change of property. So the money representing the goods paid into Court by the sheriff under the sale ordered by the Judge, as it were for the benefit of all concerned, may be considered as within the words of the last statute. But this is open to question.

I think the appeal should be allowed.

BURTON, J. A.—The respondent, in order to succeed, must be able to establish that the moneys now sought to be distributed, were moneys levied by the sheriff within the meaning of the Creditors' Relief Act.

If the money had been actually paid to the sheriff under pressure of the writ, even without an actual sale, and an interpleader subsequently arose in reference to that money, I should have thought a payment of money so made would come within the Act, as moneys levied under the writ; and the fact that a question arose subsequently as to

the title, would not prevent the statute applying in the event of its being ultimately decided that the goods, in respect of which the money was made, were the goods of the execution debtor.

But I apprehend that it would not be contended that moneys paid into Court by the claimant in pursuance of the terms of the interpleader order, even though subsequently applied to the payment of the execution, would be moneys levied under the execution.

And even though a sheriff may, in one sense, be said to levy when he seizes the goods of the debtor, so that, to the value of the goods so seized, the debtor is discharged, that would not be a levying within the meaning of this Act.

As I read the Interpleader Act, the moment the sheriff makes an application, and is held entitled to relief under the Act, the Court has jurisdiction over the subject matter, which in this case consisted of the goods seized.

The sheriff would be guilty of a contempt if he proceeded afterwards to execute the writ.

If the claimant gives security, the sheriff is ordered to withdraw; if he fails to do so the Court orders the goods to be sold and the proceeds brought into Court.

I do not at all question that, in the ultimate disposal of the case, the Court endeavors, as nearly as possible, to place all parties in the position they would have stood in if the order had not been made—so that if the execution creditor succeed, he becomes entitled to the amount indorsed upon his writ, and the sheriff to the poundage that he would have made had the proceedings gone on under the writ.

But, I apprehend they would equally be so entitled in the event of the execution creditor ultimately succeeding, if the goods had not been sold at all, but money had been paid into Court by the claimant, and the sheriff had been ordered to withdraw from possession.

The sale would not have been ordered but for the fact that the goods were seized under the writ and a claim made to them, nor would the money have been paid into

Court by the claimant, except to prevent a sale. But in the event of a sale the writ of execution is not the *causa causans*, if I may so express myself, but the *causa sine qua non*: the order would not have been made to give the security, or failing it, to sell the goods if that writ had not been in the sheriff's hands, but I am unable to convince myself that in either case the money was levied under the writ.

The Court might have directed the sale to be made by any officer. As a matter of convenience the sheriff, who is in possession, and who would but for the claim have executed the writ is directed to make the sale.

It would strike one as a rather incongruous proceeding for the Court to allow the sheriff to sell the goods, the title to which is still in dispute, under the execution as the goods of the debtor; if the Court exercises the jurisdiction conferred upon it by the statute, it leaves the question of title in abeyance, but directs a sale of the goods without reference to the title, to save expenses, and so as to place the proceeds entirely under its own control.

It is said that the cases of *Walker v. Olding*, 1 H. & C. 621, and *Wollen v. Wright*, 1 H. & C. 554, are only applicable where the claimant succeeds in establishing his title, but it is very difficult to understand those cases except on the theory that the sale was the act of the Court under the order. On any other view, and if the order is as is contended a mere permission or direction to the sheriff to proceed with the execution of the writ, why should an execution creditor, who has taken an active part in the execution of the writ, be relieved from paying the full amount of damages which the claimant has sustained by reason of his wrongful act.

In the first of these cases it was conceded that the execution creditor directed the seizure of the particular chattels, and the contest was as to whether he was liable simply to those damages arising from the seizure antecedently to the interpleader order, or for the damages consequent on the sale. The Court held that the order, and

what was done under it, were the consequences of the claim of the plaintiff, the interpleader summons of the sheriff and the decision of the Judge thereon, and being the act of the Court no damages could be recovered in respect of it against the execution creditor.

In *Wollen v. Wright*, the Exchequer Chamber treat it as clear that in such a case as the present, the sale would be under the order and not under the writ.

The sheriff may return the fact that the execution of the writ has been interfered with by the order, and I find a form of a return to a *fi. fa.* given in *Chitty*, which seems to be in accordance with the reason of those decisions that the moment such an order is made as was made in the present case, the sale proceeds under it, and is to be regarded as the act of the Court. The return there after reciting the seizure and claim was, "and I further certify and return that in obedience to an interpleader order made in respect of that claim by the Honorable Mr. Justice

I sold the same for the sum of part
whereof I have retained for fees and expenses for and on
account of seizing and keeping possession, and the ex-
penses of sale; and the residue I have paid into Court, and
nulla bona, to the residue."

The execution creditor is, of course, bound to credit the moneys he ultimately receives, whether that money is from the proceeds of the goods or was received from the claimant or his sureties, but the sheriff could not, in either case, return that the money was levied under the writ.

In one of the earliest cases, *Pearce v. Carpenter*, 27 L. J. Ex. 143, the Court consisting of Pollock, C. B., Channell, Martin and Watson, BB. treat it as settled law—that the sale after the order is not by virtue of the writ, but under the authority of the Court, and some strong remarks are made there as to the execution creditor being more entitled to relief than the sheriff, which are probably true enough where the execution creditor has done nothing more than place his writ in the sheriff's hands to be executed, but in cases where he has given specific instructions to seize the goods of a third

party, one fails to see any room for sympathy, or any reason why he should not be made liable to the full extent of the damages sustained by the claimant, unless it be on the ground that, after the order, the subsequent proceedings are the acts of the Court.

At the time when the defendant placed his writ in the sheriff's hands, the sheriff had sold the goods and paid the money into Court, in the terms of the interpleader order, to abide the issue as to the right of the claimant under his mortgage as against the execution and for no other purpose.

It was out of his power then to carry-out the directions of the statute.

If the statute could be held to apply to such a case it was his duty forthwith after the sale to enter in a book, a notice stating that a levy had been made and that the amount should be distributed ratably amongst all execution and other creditors, whose writs or certificates should be in his hands within a month from that time.

How could he truthfully make such an entry when he had parted with the money, to abide a certain issue between the execution creditor and a particular claimant.

I am of opinion that such a case does not fall within the provisions of the Creditors' Relief Act, and I think it would be exceedingly unjust if it did. That an execution creditor should be called upon to bear all the expenses of contesting the title of a third party to a fund in Court, about which alone they were litigating, and upon his succeeding should be met with a claim of this kind on the plea that those moneys were levied under the execution, appears to me contrary to justice, and I hope and believe, contrary to law.

I think that the fact that the sheriff had no control over these moneys, is sufficient in itself to shew that the case is not within the Act, and that the Judge had no power to make the order complained of.

I think, therefore, the appeal should be allowed, and the order set aside, with costs.

PATTERSON, J. A.—Under a *fi. fa.* issued by the plaintiffs against one Davis, the sheriff seized the goods of Davis. Before they were sold they were claimed by the defendants under a chattel mortgage, and the ordinary interpleader order was made for the trial of an issue between the plaintiffs and the defendants, and the defendants failing to pay money into Court, or give security, the sheriff proceeded under the terms of the order to sell the goods, and paid the money into Court. The issue was decided against the claimants, and thereupon the plaintiffs applied for payment of the money.

In the meantime, however, the defendants had obtained a judgment against Davis, and had placed a *fi. fa.* in the sheriff's hands; and, upon their claim to share in the money under the Creditors' Relief Act, 1880, an order was made to pay out the money to them and to the plaintiffs in the proportions of their respective judgments.

From that order the plaintiffs appeal, contending that the Act does not, in these circumstances, apply; and that at all events it authorizes only a distribution by the sheriff of moneys made under execution and in his hands, and not an order for the distribution of a fund in Court.

The right of the defendants to claim as execution creditors is not affected by the incident of their unsuccessful claim to the goods out of which the money was made. *Bank of Upper Canada v. Thomas*, 2 E. & A. 502. We have to regard them simply as creditors whose execution reached the hands of the sheriff at a particular date; and the substantial question is the general one whether a creditor coming in at that date can, by virtue of the Act of 1880 claim a share of the money.

The goods were sold by the sheriff on the 20th of March, 1885, and the defendants' execution was delivered to him on the 11th of April, being thus within a month from the sale. It was also within a month from the making of the interpleader order which was not made until the 13th of March, although the plaintiffs' execution had then been nearly two months in the sheriff's hands.

The direction of the statute 43 Vict. ch. 10, sec. 5, (O.) is that "In case the sheriff levies any money upon an execution against the property of a debtor, he shall forthwith enter in a book to be kept in his office, open to public inspection without charge, a notice stating that such levy has been made, and the amount thereof; and such money shall thereafter be distributed ratably amongst all execution creditors and other creditors whose writs or certificates given under this Act, were in the sheriff's hands at the time of such levy, or who shall deliver their writs or certificates to the said sheriff within one calendar month from the entry of such notice," &c.

Did the sheriff levy the money in question upon an execution against the property of Davis?

The appellants contend that he did not, but that he merely sold the goods under the interpleader order, and that therefore section 5 does not apply.

This contention is, in my opinion, founded upon a misapprehension of the office and effect of the order.

The goods being seized on the *fi. fa.* and the sheriff's duty being to sell them if they belonged to Davis, the order gave the claimants an opportunity to avert the sale by giving security that, if their claim failed, the execution creditor should be as well off as if the sale had proceeded. Failing the giving of such security the sale was to go on, but the money, instead of being paid to the execution plaintiffs at once, was to be paid into Court to abide the decision on the claim. The order protected the sheriff in case it should turn out that he had sold goods that belonged to the claimants. They would have to be content to take the money instead of the goods, and after that result it could not be asserted that the money was levied under the execution, which would remain unsatisfied. But when it is established that the goods were the goods of the execution debtor, and that by their sale the execution is satisfied, either wholly or *pro tanto*, the conclusion that the money which satisfied it was money levied by the sheriff upon it is, to my mind, unavoidable.

I cannot say that I have found anything in the decisions to which my attention has been directed to lead me to doubt that my conclusion correctly interprets the meaning of the statute and the intention of the Legislature as applied to the circumstances before us.

Such cases as *Walker v. Olding*, 1 H. & C. 621, and *Kennedy v. Patterson*, 22 U. C. R. 556, appear to me to be beside the present question, except so far as they affirm the proposition that, as far as the claimant who establishes his title to the goods is concerned, the sale is authorised by the interpleader order. The point decided in these cases, namely, that the execution creditor is not liable for damages that accrue after the order, notwithstanding that he may have so identified himself with the sheriff as to be liable in trespass for the seizure, does not touch a case like this where the goods seized and sold are those which the writ commanded the sheriff to seize and sell.

Nor do I find any nearer analogy in such decisions as *Clarke v. Farrell*, 31 C. P. 584, or the others discussed or referred to in the judgments delivered in that case, where the question was the right of the landlord to claim a year's rent under the statute of 8 Anne, ch. 14, from the sheriff who had seized and sold goods which, being the goods of a stranger to the execution, he was not authorized by the writ to seize. Wilson, C. J. said, in *Clarke v. Farrell* with perfect correctness, (p. 598.) "In this case the sheriff made the sale not under the plaintiffs' execution, but under the order (the interpleader order) of the Court." And my brother Osler put the same thing with equal accuracy, but somewhat more fully, when he said (p. 596.) "But if security is not given and the goods are sold, as in the present case, they are sold not under the execution, but by virtue of and under the authority of the order alone, and the sale is not, except in the event of the execution creditor succeeding, a sale within the statute as construed in *Risely v. Ryle* 11 M. & W. 16, for the satisfaction of the debt."

When the sheriff having an execution against A. seizes and sells the goods of B. against whom he has no execution, it is clear enough that he does not sell them under the

authority of the writ, and that, if directed to sell them by an interpleader order to which B is a party, he sells them under the order alone. That was the case in *Clarke v. Farrrell*. But if the execution creditor, as here, succeeds, we have the alternative result that the sale is for the satisfaction of the debt, or what is to my mind the same thing, in execution of the writ. As said by Jervis, C. J., in *White v. Binstead*, 13 C. B. 304, 308. "Until that issue was determined it was uncertain whether execution was executed or not; for if it turned out that the sheriffs had seized the goods of a third person, there was no execution to justify them in selling them, or to entitle the landlord to the rent."

If under the circumstances the money, though made by the sheriff's sale and adjudged to belong to the execution creditor, is not money levied by the sheriff upon the property of the execution debtor, it follows, as I apprehend, that the writ is never wholly executed, an anomalous result which I can see no reason either on the ground of principle or convenience for conceding.

The sheriff gets his poundage on the amount though his right to it, like the execution creditor's right to the money, was for a while in suspense.

This rule which is found in all the books of Practice is thus stated in *Tidd's New Practice* at p. 584: "The sheriff's right to poundage depends upon the event of the suit; and if that be determined in favor of the execution creditor the sheriff will of course be entitled to his poundage; but otherwise not."

In the case of *Barker v. Dynes*, 1 Dowl. 169, which seems to be the only reported decision on the subject, the question was not so much the right of the sheriff to poundage as his right to retain it out of the money made by a sale of goods before the interpleader order, instead of paying the whole into Court. The order was to pay in the whole as his right to poundage had to abide the result.

The execution of the writ is begun by the seizure. Under the statute 20 Geo. II. ch. 37, which required the outgoing sheriff to turn over to the new sheriff all such writs

and process as should remain in his hands *unexecuted*, he did not turn over a fi. fa. on which he had seized goods which remained in his hands unsold, and process could be issued to the new sheriff to compel the old sheriff to go on and sell: *Tidd's Practice*, 9th ed. 1021. But by 3 & 4 William IV. ch. 99, sec. 7, which is followed by our statute R. S. O. ch. 16, sec. 46, he hands over all writs *not wholly executed*, which term seems to include writs of fi. fa. on which goods have been seized but not sold, as is stated in *Lush's practice* at p. 592, and apparently recognised by our legislature in providing specifically (R. S. O. ch. 66, sec. 43) for the sale of lands by the new sheriff when the advertisement, which by section 42 is made equivalent to seizure, has been published by his predecessor in office. And see *Harrison v. Paynter* 6 M. & W. 387.

In my opinion the writ becomes wholly executed by the sale which is shewn by the result to be a sale of the goods of the execution debtor, and the money is money levied upon the execution.

Thus the money comes within the description contained in section 5, and that section declares the right of the second execution creditor to share in it without any intimation that he is to take his share only from the hand of the sheriff.

It is, of course, true, that the statute, which was passed to regulate the distribution of money made by the sheriff on executions, contemplates the payment of the money by the sheriff directly to the parties entitled, and in later sections it provides for his ascertaining who those parties are; but it nowhere makes the right of the parties dependent on the action of the sheriff, or forbids the Court, when, for some collateral purpose, it has assumed the custody of the money, paying it to the parties who would have been entitled to it if it had remained in, or had been restored to the hands of the sheriff.

We have been furnished by Mr. Henderson with copies of a judgment delivered by the learned Master in Chambers, in *Levy v. Davis*, in which he holds, after a careful

discussion of the matter, that money paid into Court under an interpleader order, as in the case before us, remains, after a decision against the person who claimed adversely to the execution creditor, subject to be distributed in the same manner as if no claim had been made. This conclusion is the same as mine, but the order made by the Master, which was to repay the money to the sheriff, who was to distribute it under the statute, is in this case unnecessary, because the parties entitled are ascertained, and it is not suggested that their rights are not correctly dealt with by the order of the County Court.

For these reasons, I think we should dismiss the appeal.

I base this opinion upon the few facts which alone are material ; that is to say, the fact that the money in question was levied on the execution of the plaintiffs ; and the fact that within a month thereafter the defendants placed their execution in the sheriff's hands.

I indulge in no speculations outside of those facts.

Possible cases readily suggest themselves in which injustice may result from what at first sight seems the operation of the statute, and in which the expressed intention of the Legislature in passing it may fail of effect. The wiser course is therefore to confine oneself strictly to the case presented.

In *Dawson v. Moffatt*, 11 O. R. 487, all the learned Judges of the Chancery Division concurred in the decision that the principle of the Creditors' Relief Act, 1880, justifies the Court in distributing ratably among the creditors a fund belonging to an execution debtor which happens to be in the control of the Court, in place of recognising, as in former times, the order of priority according to the dates at which executions were issued.

This decision supports my view of the power of the Court to deal with the money ; but I prefer to place the decision of this case upon the ground that its facts come directly within the statute.

OSLER, J. A.—If this money can be properly said to be money levied by the sheriff upon an execution, then it must be distributed in accordance with the directions of section five of "The Creditors' Relief Act, 1880."

The goods by the sale of which it was produced, were seized under the plaintiffs' execution as being the goods of the debtor. They were claimed by a third party, and the usual interpleader order was made for the trial of an issue, the goods being then in the custody of the sheriff under the writ.

The claimant having made default in giving security for the due forthcoming of the goods or payment of their appraised value, the sheriff sold them under the usual direction in the order, and paid, or should have paid the proceeds of the sale into Court, to abide further order. The execution creditor having succeeded on the trial of the issue, the question now arises whether the money so paid into Court is distributable among the class of creditors mentioned in section five as being money levied on the execution.

The fact that the actual sale of the goods took place under the immediate direction of the Court in the interpleader order, is not the test, as that was merely a matter of administration by the Court of the proceedings under the writ pending the disposition of the claim.

In *Abbott v. Richards*, 15 M. & W. 194, the action was by the successful claimant against the sheriff for trespass in seizing and selling the goods. It was held that the sheriff was protected by the order. Alderson, B., thus speaks of the powers conferred upon the Court by the Interpleader Act:

"The Court or Judge has a jurisdiction over the subject matter brought into Court, which in this case consisted of the goods seized, and has power to dispose of them in such a manner as according to the circumstances of the case shall appear to be just and reasonable. The sheriff holds them at the discretion of the Court or Judge who is to make such order with respect to them, as according to all the circumstances of the case shall appear just and reasonable."

So Blackburn, J., says, in *Cooper v. Asprey*, 1 B. & S. 932 :

"The Interpleader Act says that when goods taken in execution are claimed, the Court may bring the execution creditor and the claimant before him, and protect the sheriff against both, and may decide that the goods be delivered to either party. In order to exercise this jurisdiction, it is necessary that the Court should have control over the fund."

Whether, therefore, the property remains in specie, or is sold under the direction of the order, and the proceeds paid into Court or retained by the sheriff, it is the fund, the subject matter which he has seized under the writ, which, if it turns out not to be the claimant's property, is applicable to discharge it.

It is merely brought by the sheriff under the control of the Court pending the disposition of the issue, and becomes money levied upon the execution as soon as the claimant's title is finally barred. It is then seen to be the proceeds of the debtor's goods taken in execution, applicable pro tanto in discharge of the writ.

The case of *Walker v. Olding*, 1 H. & C. 621, and similar cases merely decide—not that where there is a sale, the money is levied under the order, but—that the sale being the act of the Court the execution creditor is not liable for any special damage caused by it.

The decisions upon the sheriff's right to poundage shew that this money, though the proceeds of a sale made immediately under the order, must be looked upon, where the execution creditor succeeds, as money levied upon the execution.

In a case of this kind the sheriff is always entitled to his poundage. Why? It must be because the writ has been executed wholly or in part.

A sale is not necessary to constitute a levy. It is enough if there has been a seizure of the goods or what is equivalent to one, and that the money has in fact been made by compulsion of the writ.

In *Bissicks v. The Bath Colliery Co.*, 2 Ex. D. 459, the sheriff's officer, with another man, went with the warrant to the debtor's premises and told him he had it and must be paid immediately or the man would remain in possession. Thereupon the amount demanded was paid by him with the sheriff's poundage and fees. A rule was obtained to compel the sheriff to refund the poundage.

Cockburn, C.J., said: "The question is whether the writ of *fi. fa.* was executed. If it was the sheriff is entitled to the poundage. If it was not executed he was not entitled. * * In my opinion it is enough if the sheriff's officer goes down to the premises with the warrant and gets payment. * * We must look to see if the writ has been virtually executed."

Cleasby, B., said, "It is of no use attempting to define a levy. In this case I think there was in substance an actual levy, and if so the sheriff is entitled to his poundage and fees."

Mortimer v. Craggs 3 C. P. D. 216, was a similar case. The sheriff had seized the defendant's goods and after remaining in possession for some days had given them up again without selling them, upon payment of the amount of the execution with his poundage fees, &c.

Bramwell, L. J., refers to the Statute 28 Eliz. ch. 3, which, in England, regulates the sheriff's right to poundage "for the serving and executing any execution upon the goods and chattels of any person, that he shall so levy," and says, "I think the words in the Statute of Eliz. 'shall so levy,' mean 'shall seize and thereby get the money.' It is the seizure made by the sheriff that produces the money."

Brett, L. J.: "The word 'levy' in legal meaning is, where goods are seized and money obtained by compulsion. If that is the meaning of the word levy, it does not necessarily comprise a sale. To entitle the sheriff to his poundage, a sale is not necessary. It is enough if there is a seizure and the money is obtained either directly or indirectly."

Cotton, L. J.: "Whenever process is made effectual by payment of money, the sheriff is entitled to his poundage."

Under our Execution Act, R. S. O., ch. 66, seizure of the goods and subsequent satisfaction without sale, and perhaps payment to the sheriff under compulsion of the writ without actual seizure, will entitle the sheriff to poundage or an allowance in lieu thereof.

What reason can there be for giving the language of section five a narrower meaning than is attributed to the word *levied*, as used in the English Act? If, instead of keeping the property and selling it after the trial of the issue, the sheriff is, in the discretion of the Court, directed to sell it pending the proceedings, is not the money he thus receives, money obtained under and by virtue of the execution, payable to the execution creditor if the property was the execution debtor's, but payable to the claimant if the property was his, just as the latter would have been re-delivered to him if it had not been sold?

The case may also be noticed of the landlord's claim for rent, which would have to be discharged out of the proceeds of the goods seized if the result was to shew that they were the execution debtor's goods, and therefore that there had been a substantial taking of the goods for the satisfaction of the debt. *Risely v. Ryle*, 11 M. & W. 16-19; *Clarke v. Farrell*, 31 C. P. 584, 596.

Smith v. Critchfield, 14 Q. B. D. 873, shews that where the sheriff has seized goods and the claimant pays him the amount of the execution under protest, he is entitled to interplead in respect of the money so paid, as being really the proceeds of goods taken in execution.

If the money was paid into Court under an interpleader order in such a case as that, I think it could not be said that it was not money levied upon the execution, though there was no sale under the writ, if it ultimately turned out that the goods seized were the execution debtor's; but is not its character the same as that of the money in Court in the present case, even admitting, as of course must be admitted, that the sale was under the immediate authority of the order and not of the writ?

If a sale of the goods seized is not necessary to give the money the character of "the proceeds of goods taken in execution," how can the fact that a sale has taken place under the interpleader order make the proceeds of such a sale less money received under and by virtue of the execution, and therefore in the event of the execution creditor succeeding, money levied on the execution, than money paid by the claimant under protest for the purpose of preventing a sale, is so?

I quote a passage from the judgment of the Master of the Rolls in the last case, which seems applicable:

"The object of the seizure in execution is that the goods seized may be converted into money to satisfy the judgment. This is usually done no doubt through a sale by auction, the sheriff handing over the proceeds of the sale to the execution creditor. But is this money any less the proceeds of the goods because instead of being produced by a sale of the goods it is paid in order that the party paying it may keep his goods. It is money paid to represent the goods, and paid with the intention that it should be paid to the execution creditor if the goods were the execution debtor's. It seems to me that in substance this money is as much the proceeds of the goods and chattels taken in execution as if it had been the proceeds of a sale by the sheriff."

So in the case before us, the money which has been paid into Court represents the goods seized. It cannot be material that in the discretion of the Court they were ordered to be sold pending the trial of the title. The main fact is that the money was obtained under and by virtue of the execution and represents the goods. It is, therefore, in my opinion, money levied on the execution, since it has now become applicable to discharge it. I must add that the reasoning in the last cited case seems to me conclusively to shew that if money was paid by the claimant into Court under the alternative condition of the order it would, in the event of the execution creditor succeeding, be money levied on the execution and distributable as such.

Substantially, I agree with the views of the learned Master in Chambers, on this question, as expressed in the case of *Levy v. Davis*. (Not reported.)

I admit that there may be difficulties in working out the provisions of the Creditors' Relief Act, and in determining what creditors are to share in each particular fund as it arises, and the date at which their rights are to attach, and further, that serious hardship and injustice may in the future, as in the past, be inflicted on creditors who contest ultimately perhaps at their own expense claims to goods seized under the execution. Such consequences are inevitably incident to legislation which, while attempting to supply in some particulars the want of a bankrupt or insolvent Act, is if *intra vires* the Provincial Legislature, necessarily not an Act of that character, and therefore fails to provide those equitable adjustments which the scheme of such an Act includes.

I regret that one of my learned brothers should think that this decision is contrary to justice and law. I humbly think upon the fullest consideration that it is in accordance with the plain meaning of the statute, and am therefore of opinion that the appeal should be dismissed.

Appeal dismissed, with costs.

SUTHERLAND V. COX.

Usage of brokers—Carrying stock on margin.

THE judgment of the C. P. D., reported 6 O. R. 505, was affirmed unanimously by this Court, and the appeal therefrom dismissed, with costs :—[1 March, 1887.]

Lash, Q. C., and *W. Cassels*, Q. C., for the appellants.
D. E. Thomson, and *D. Henderson*, for the respondent.

CAIN V. JUNKIN.

Grant from the Crown—Error in description—Possession.

THE judgment of the C. P. D., 6 O. R. 532 was affirmed, and an appeal therefrom dismissed, with costs, by the unanimous judgment of this Court :—[1 March, 1887.]

McCarthy, Q. C., and *Hudspeth*, Q. C., for the appellants.
Moss, Q. C., and *Poussette*, Q. C., for the respondent.

SEYMOUR V. LYNCH.

Construction of deed—Lease or license.

THE judgment in this case, reported 7 O. R. 471., was, by reason of the members of this Court being equally divided, affirmed, and the appeal therefrom dismissed, with costs :—[1 March, 1887.]

Northrup, for the appellant.
Clute, for the respondent.

REGINA V. ELI.

Conviction under Canada Temperance Act—Appeal—Want of jurisdiction—Quashing appeal.

The defendant who was convicted by two justices under the Canada Temperance Act removed the conviction by certiorari, and the same was quashed. On appeal to this Court:

Held, that there was no jurisdiction in this Court to hear the appeal and the same was therefore quashed with costs to be paid by the informant.

THIS was an appeal by the prosecutor Patrick Heffernan from the judgment of O'Connor, J., reported 10 O. R. 727, where the facts are fully stated, and came on to be heard on the 16th of November, 1886.*

Allan Cassels, for the appellant.

H. J. Scott, Q. C., for the defendant.

December 23rd, 1886. PATTERSON, J. A.—The respondent Eli was convicted for an alleged offence against the Canada Temperance Act, 41 Vict. ch. 16, (D.) and the conviction having been removed into the High Court, by certiorari, was quashed by Mr. Justice O'Connor, (10 O. R. 727.)

The prosecutor, at whose instance the proceedings were taken under the Act, has had the papers which were before the High Court transmitted to the registrar of this Court, and desires to be heard by way of appeal from Mr. Justice O'Connor's decision. He is met by the objection that no such appeal lies, and that at any rate he has no locus standi. We think the objection is fatal.

The jurisdiction of this Court, which in civil cases has been somewhat extended by the 13th section of the Judicature Act, remains in criminal cases the same as before the passing of that Act. There is no express provision in the Canada Temperance Act or in any other Act of the Dominion Parliament that can aid the appellant. He has to rely entirely on the general powers of the Court, and a

short reference to the statutes will shew that they do not reach the case.

The Court of Error and Appeal, as established in 1849, by 12 Vict. ch. 63, had an appellate civil and criminal jurisdiction conferred upon it by the 40th section of that statute, with full power and authority to hear and determine in due course of law all matters which should be lawfully brought before it, the same section declaring that an appeal should lie to the Court of Error and Appeal from all judgments of the Courts of Queen's Bench and Common Pleas, and from all judgments, orders and decrees of the Court of Chancery. This clause is found in the C.S.U.C. ch. 13, sec. 9. The appeal given by it from judgments of the Common Law Courts was only by assignment of errors upon the record of the final judgment. The jurisdiction in this respect was the same as that of the Court of Exchequer Chamber, though our Legislature by using the word "appeal" as including "error"—which latter word is carefully adhered to in the English statutes, as *e.g.* in the Act of 11 Geo. IV. & 1 Wm. IV., ch. 70, which originated the Court of Exchequer Chamber, and in the C. L. P. Act, 1854, sec. 32, which gave a right to bring error on a judgment on a special case, and is never confounded with "appeal"—made it easy to misapprehend the effect of the legislation.

The first introduction of "appeal," as distinguished from what is technically called "error," from decisions of Common Law Courts, was in England under the Common Law Procedure Act, 1852, sec. 34, &c., and with us by the adoption of similar provisions by our statute 20 Vict. ch. 5. An appeal was given by these statutes from decisions upon motions for nonsuit on leave reserved, and certain other motions, as found in C. S. U. C. ch. 13 secs. 23 &c. and our statute added, following the English C. L. P. Act, 1852, "No other appeals from the decision of the said Courts of Queen's Bench and Common Pleas shall be allowed unless the judgment, decision or other matter appealed against shall appear of record."

The statute 20 Vict. ch. 61 introduced the short-lived right to move for new trials in criminal cases by the person convicted, going on to give him an appeal to this Court in case his conviction was affirmed, and recognising by this express provision the limitation of the general appellate criminal jurisdiction to cases of error on the record.

The Act 20 Vict. ch. 61, became chapter 113 of the C. S. U. C., the sections which give the appeal being also carried into the Consolidated Act respecting the Court of Error and Appeal, C. S. U. C. ch. 13, sec. 29, where a slight change in its language makes its restriction to cases of motions for new trial less distinct than in the original Act or in chapter 113, and would perhaps extend to decisions on points reserved at the trial.

Chapter 113 was repealed by the Dominion statute 32 & 33 Vict. ch. 36 excepting three sections on other subjects than those now in discussion; and the right of appeal from a decision on points reserved is expressly negatived by the Criminal Procedure Act, 32 & 33 Vict. ch. 29, sec. 80, (D.)

The distinction between appeals by way of assignment of errors and the other class of appeals from decisions not of record was pretty fully discussed in this Court in *Dickson v. Ward*, 2 E. & A. 275. See also *Grand Trunk R. W. Co. v. Amey*, 20 C. P. 6.

There is nothing to be gained in this discussion by reference to the Act respecting the Court of Appeal R.S.O. ch. 38. It deals with civil cases only, not even repeating sec. 29 of the C. S. U. C. ch. 13, for the reason as noted in the schedule to the statutes, that it was on a subject within the legislative jurisdiction of the Dominion Parliament. If that section was not repealed by the effect of the Dominion legislation I have referred to, it simply stands as part of the old Consolidated Statute, and apparently an effete enactment.

In all the statutes, 20 Vict. ch. 5, C. S. U. C. ch. 13, and R. S. O. ch. 38, there are express directions as to the mode

of bringing forward appeals when error is assigned, which have not been attempted to be followed in this case, doubtless because of their evident inapplicability. The case is not one in which either error or appeal, using those terms as covering the only modes of resort to this Court, will lie. We have not jurisdiction to hear the appeal, and therefore, without entering on any discussion of the *locus standi* of the appellant or any of the other points argued before us, we must quash the appeal, with costs.

OSLER, J. A.—The defendant was summarily convicted by two justices of the peace under the Summary Convictions Act of Canada and the Canada Temperance Act, of an offence against some provision of the latter Act, and the conviction having been removed into the High Court by *certiorari*, was quashed by Mr. Justice O'Connor sitting as a Judge in Court under section 28 of the Judicature Act.

The prosecutor appeals from that judgment.

The appeal is a mere experiment equally devoid of precedent and authority. We have no jurisdiction whatever to entertain it. I, therefore, express no opinion upon the merits, further than to say that I fully concur with the observations made by the Court upon the impropriety of the conduct of the magistrates as disclosed upon the affidavits.

If the right of appeal exists, it must rest upon some statutory foundation, and that is wholly wanting.

The appellant relied upon the Court of Appeal Act and the Judicature Act. The former, ch. 38, sec. 18, enacts that the Court of Appeal shall have an appellate jurisdiction in civil and criminal cases, and that an appeal shall lie thereto from any judgment of any of the Superior Courts or of a Judge sitting alone as and for any such Courts in a cause or matter depending therein, &c.

Section 13 of the Judicature Act preserves this jurisdiction, without attempting to extend it as regards criminal cases, declaring that the Court shall continue to have all

the jurisdiction and power which it has theretofore had, save as varied by the Act, and in civil cases shall also have jurisdiction and power to hear and determine appeals from any judgment or order (with certain exceptions) of the High Court of Justice or any judge thereof.

Section 87 and rule 484 declare that nothing in the Act or rules affects, or is intended to affect, the practice or procedure in criminal matters.

These provisions are, of course, merely introduced for the sake of greater caution, inasmuch as the power to legislate upon such subjects pertains exclusively to the Dominion Parliament.

Under the English Judicature Act, 1873, the right of appeal conferred by sec. 19, though not limited by that section, as in the corresponding section 13 of our statute, to judgments in civil cases, is by subsequent provisions declared not to extend to judgments in any criminal cause or matter, and the practice and procedure in all criminal causes and matters remain unaffected.

In the *Queen v. Fletcher*, 2 Q. B. D. 43, an attempt was made to induce the Court to entertain an appeal from a judgment of the Queen's Bench Division discharging a rule for a certiorari to bring up a summary conviction for the purpose of quashing it, but it was held that this was a judgment of the High Court in a criminal matter, and therefore that no appeal lay: And see *Regina v. The Justices of the Central Criminal Court*, 17 Q. B. D. 598; W. N. 1886, p. 181.

The result as regards our own Judicature Act must, as a matter of construction merely, be precisely the same, as any additional right of appeal conferred by it is expressly limited to judgments in civil cases.

We therefore go back to section 18 of the Court of Appeal Act R. S. O. ch. 38, but this merely shews that a Court of appeal has been constituted or continued with jurisdiction to hear appeals in criminal cases. We must look elsewhere for the legislation which creates and regulates the right of appeal in such cases. It cannot of course

be found in the Statutes of Ontario. The "judgments of the Superior Courts" mentioned in section 18 are unquestionably limited to judgments in causes or matters over which alone the Provincial Legislature has jurisdiction.

The present Court of Appeal was originally constituted by 12 Vict. ch. 63; sec. 40 of which provided that it should have appellate civil and criminal jurisdiction throughout Upper Canada, and that an appeal should lie thereto from all judgments of the Queen's Bench and Common Pleas and from all judgments, decrees, and orders, of the Court of Chancery.

The appeal provided by this section from the judgments of the Courts of law of course extended only to judgments of record in an action criminal or civil, and did not embrace decisions on rules nisi or interlocutory or special applications. An appeal was afterwards given in a limited class of cases of that kind, among others for example, from a rule quashing a by-law, by the 20 Vict. ch. 5; and section 19 provided that no other appeal from the decision of those Courts should be allowed unless the judgment decision or other matter appealed from appeared of record, that is to say, was a matter which could be brought up by way of error. Thus an appeal from a judgment or decision quashing or refusing to quash a conviction was clearly excluded, as that was not one of the cases specified and never had been the subject of a writ of error like a judgment on an indictment. Lord Raymond p. 469.

In the same session was passed the 20th Vict. ch. 71, intituled an Act to extend the right of appeal in criminal cases in Upper Canada. The preamble of this Act contains a distinct affirmation of what I have just stated, reciting that the right of appeal on convictions for criminal offences was allowed only on questions of law reserved by the judge before whom such offences were tried (14 & 15 Vict. ch. 13, C. S. U. C. ch. 112), and that it would be conducive to the ends of justice if such right of appeal were extended. A special and limited appeal was then given by enacting

that a person convicted before a Court of Oyer and Terminer, or gaol delivery of any treason, felony, or misdemeanour might apply for a new trial to either of the Superior Courts of Common Law, and if the conviction was affirmed, might appeal to the Court of Error and Appeal against such affirmation.

A more restricted appeal was also given against similar convictions at the Quarter Sessions, which need not be further referred to.

Thus the law stood when the statutes were consolidated in 1859. The act respecting the Court of Error and Appeal is C. S. U. C. ch. 13, sec. 9 of which, under the head "Jurisdiction and Powers," contains in substance the language of that part of 12 Vict. ch. 63, sec. 40, already quoted. Under appropriate headings, secs. 22 to 30 define the cases in which appeals are permitted from the Courts of Queen's Bench and Common Pleas: "1. In certain civil cases;" specifying those mentioned in 20 Vict. ch. 5. "2. In criminal cases;" the appeal given by 20 Vict. ch. 61, sec. 4; and "3. Appeals restricted. No other appeal from a decision of the Courts of Queen's Bench and Common Pleas shall be allowed unless the judgment decision or other matter complained of appears of record."

Section 29 of this Act has probably been repealed by 32-33 Vict. ch. 29 (D.), sec. 80, and the same section also takes away the right of new trial in criminal cases. See also ch. 36, and schedule.

It is hardly necessary to say that no appeal of this kind is given by the Summary Convictions Act or any other Act of the Dominion Parliament.

The Provincial Act 44 Vict. ch. 27, sec. 17, professes to give a right of appeal from a judgment quashing a conviction under the Liquor License Act, R. S. O. ch. 181, or that Act, and such an appeal was brought in the case of the *Queen v. Hodge*, 1 A. R. 246.

No question was there raised nor need any opinion now be expressed whether this enactment was *intra vires* the Provincial Legislature. It would seem to have been unneces-

sary if an appeal lay under sec. 18 of the Court of Appeal Act.

The case of *In re Boucher*, 4 A. R. 191, was referred to. The Court was there dealing with the appeal given by the Act of the Parliament of Old Canada, 29 & 30 Vict. ch. 46, sec. 6, in the case of a writ of habeas corpus to bring up a person in custody under a criminal charge.

The judgment of Moss, C. J. O., is wholly adverse to the notion that such an appeal was or could be created or regulated by anything in the Court of Appeal Act.

With the possible exception of the case specially provided for by the 44 Vict. ch. 27, sec. 17, (O.), it is clear that no right of appeal to this Court from a judgment quashing or affirming a summary conviction has ever existed.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal quashed, with costs.

HAMILTON AND FLAMBOROUGH ROAD COMPANY V.
TOWNSEND.

HAMILTON AND FLAMBOROUGH ROAD COMPANY V. FLATT.

Road Company Acts required to be done before incorporation—Infant shareholder—Married woman shareholder—Fraud on statute—Insufficient stock subscription.

By R. S. O. ch. 152, five persons are allowed, on taking certain steps, to form themselves into a company for the purpose of either making a road or purchasing one already constructed, without the sanction of any authority, executive or judicial. Such proceeding is wholly the act of the parties, and no conclusive force is afforded by the certificate of registration issued by the registrar under the 15th section of the Act. Therefore, where one W., with his wife and two sons—one a minor—together with another relative, by an instrument in the form required by the statute, executed by them, and duly registered, declared that they had formed a joint stock company (limited) for the purpose of purchasing the roads franchise, &c., of the Hamilton and Milton Road Company, &c., with a capital stock of \$5000, the whole amount of which was subscribed for by these persons, on which they had paid 5 per cent. into the hands of the treasurer of the company—another son of W.—and all five of the shareholders were duly chosen directors; and having thus purported to constitute themselves a company, they purchased the roads from the companies holding the same at the alleged price of \$31000; and subsequently brought actions to recover tolls said to be due for the use of the road.

Held, [reversing the judgment of the Court below,] that, by reason of the infancy of one of the subscribers, the company had no legal existence at the time of the registration of their declaration of incorporation, and that no subsequent ratification by him after attaining majority could validate his contract, and

Quære, whether the contract was signed by more than three persons capable of contracting, as the Married Woman's Property Act (47 Vic. ch. 19, (O.)) did not enable married woman to bind themselves personally by their general contracts.

Held, also that the amount of the stock subscribed could not be said to be sufficient in the judgment of the shareholders as required by the statute as a condition precedent to the incorporation of a company to purchase a road.

THIS was an appeal by the defendant from the judgment of Wilson. C. J., pronounced on the 16th September, 1885, adjudging that the plaintiffs were entitled to recover from the defendant the amount sued for in this action for certain tolls claimed by the plaintiffs against the defendant, together with the costs of the action; and came on to be heard before this Court on the 12th and 27th of May, 1886.*

Osler, Q.C., and W. Nesbitt, for the appellant.

* *Present*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

Lash, Q.C., and *R. Waddell*, for the respondents.

The circumstances giving rise to the action, and the points relied on, appear in the present judgments.

November 4, 1886. HAGARTY, C. J. O.—Many objections have been taken in these cases to the plaintiffs' right to recover. Some of them question the existence of the plaintiff company, and may be conveniently disposed of before considering the others.

The law governing this road company is R. S. O. ch. 152. Five persons are allowed on taking certain steps to form themselves into a company either to make a road or to purchase one already made. No company (it is declared) shall be incorporated until certain specified matters are complied with.

The forms to be complied with are the same in each case. The formation of such company is left wholly to the action of the parties themselves. No sanction is required from any authority, executive or judicial; it is wholly the act of the parties.

In this it differs essentially from the law governing the formation of Joint Stock Companies with limited liability. The Imperial Act of 1862 regulates the practice.

The Act is given in Buckley on Joint Stock Companies, (1883), and the copious notes to the different clauses fully explain its provisions.

Sec. 17 provides that the memorandum of association and articles shall be delivered to the registrar of Joint Stock Companies, who shall retain and registrar the same.

Sec. 18, upon registration the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited; then the subscribers of the memorandum of association, together with such other persons as may become members of the company shall thereupon be a body corporate by the name, &c. "A certificate of the incorporation of any company given by the registrar shall be conclusive evidence

that all the requisites of this Act in respect of registration have been complied with."

The effect of this section has been several times discussed: *Re Hertford Brewing Co.*, 43 L. J. 358; 22 W. R. 359.

The effect of the case is stated in *Simpson on Infants* (1875), also in *Buckley*, 6. A company after a short existence passed into voluntary liquidation, which was continued under supervision: a subscriber of the original memorandum was struck off the list of contributories on the ground that he was an infant, and apparently without much discussion a compulsory winding up order was made by Jessel, M. R. *Buckley* proceeds, "but this case did not necessarily decide that the registration was invalid. It is enough to say that inasmuch as the supervision order would have been bad if the registration was invalid, it was preferable to make a compulsory order which would be good in either event."

The report is very meagre in both books. The chief clerk had refused to proceed deeming the registration invalid. A petition was presented, and the Master of Rolls made the order asked, and directed the liquidator to give a new bond, and gave leave to the chief clerk to adopt the same sureties for the same amounts as before, and all proceedings under the supervision order.

This case is noticed in *Re Nassau Phosphate Co.*, 2 Ch. D. 610, before Hall, V. C., who says the contention is, that "if one or more it may be all of the seven persons subscribing the memorandum of association of a company be an infant or infants, the intended company does not become incorporated, and all subsequent proceedings purporting to be under the Act are invalid, and if a winding up order be made it is inoperative."

"The 6th section enacts that the memorandum must be signed by "seven persons." Is not an infant a person? The signature of an infant is not necessarily inoperative and void. The memorandum having been signed by seven persons is taken to the registrar for purposes of registration, and the 17th section provides that the memorandum having been delivered to the registrar he shall retain and register the same. It is not for him to inquire whether the persons subscribing are infants; and by sec. 18 'the regis-

trar shall certify under his hand that the company is incorporated; and that the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate, &c." He then points out that it provides that the certificate of incorporation given by him shall be conclusive evidence that all the requisitions of the statute have been complied with. He says it is plain that the certificate is made conclusive. That it would be disastrous now to hold otherwise, or that the company consist of nothing more than a number of persons associated as partners and liable as such to persons dealing with them. He says that the Hertford Brewing Company is not to be considered an authority for him to follow, and he looks on it that the order was made substantially by consent. In this last case the company had been ordered to be wound up on a shareholder's petition. The dictum of Sir J. Turner, V. C., in *Re Northumberland and Durham Bank*, 2 De.G. & J. 357, is cited: "If this company was not authorized to be registered I take it to be quite clear that the certificate of registration can be of no avail."

Oakes v. Turquand, L. R. 2 H. L. 325. Among the numerous points raised in this celebrated case by unfortunate shareholders seeking relief, was one striking at the original memorandum of association of Overend, Gurney & Co. (Limited). Lord Chelmsford, C., deals with this at p. 354, holding that the certificate was conclusive and prevented "all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive." Lord Cranworth at p. 369 takes the same view.

Princess of Reuss's Case, L. R. 5 H. L. 176, was also a case between shareholders and creditors and the effect may be best stated in the head note.

"Where the requisite number of persons and requisite forms of application are presented to the registrar, &c., under the provisions of the Companies' Act, 1862, though the persons applying for registration of a company may be foreigners and though there may be many circumstances

tending to shew that the company is in several respects a foreign company, he is not bound to refuse it registration.'

Lord Hatherley, C., said: "There was nothing on the face of the memorandum which prevented the company being registered under the statute as it was in the form prescribed, signed by the right number of persons, and stating the number of shares they held;" and to the same effect at p. 195.

Lord Cairns, at p. 199, very fully adopts the same view. He points out that there was an apparent irregularity in the articles of association as to the form of shares and adds, "It is not necessary to decide that, but it appears to me that the registrar might well have refused to grant a certificate of incorporation upon the score of the irregularity which I have mentioned in the articles. And I doubt very much whether any mandamus would have been issued to compel him to register the company without an alteration being made in those articles. But although there was that irregularity, I find, notwithstanding, that there were seven persons clearly subscribing for and holding shares and therefore persons whose names would clearly come upon the register and indeed must be inserted upon it."

He points out that it would have been wise if the legislature in a case where there was an abuse of the Act (as there was there), a case where, if it had been a matter of a royal grant there would have been what is termed a forfeiture of the franchise by reason of non-user or mis-user, to say that in a case of that kind there should be some summary peremptory mode of reducing or getting rid of the incorporation and putting an end to a state of things which was a fraud upon an Act of Parliament and ought not to be allowed to continue.

He adds that sufficient powers may be exercised under the winding up processes, one of which is, "whenever the Court is of opinion that it is just and equitable that the company should be wound up." In *Glover v. Giles*, 18 Ch. D., 173, before Fry, J., it was held that the Court had no power to declare the certificate of incorporation of a building society, given by the registrar under the Societies' Act of 1874, void, on the ground that it had been obtained irregularly.

The learned Judge considered he had no power to inquire whether the meeting at which the incorporation was resolved on was regularly called, and other objections.

He thought that under that particular Act the registrar might have inquired and called for proof, &c. He adds: "The incorporation of persons into bodies corporate is a prerogative of the Crown, and although in this case the prerogative is exercised under certain statutory provisions, the incorporation is none the less an exercise of prerogative. There is a perfectly well known method by which an incorporation may be recalled or made void. Moreover, it is competent to proceed by quo warranto and to shew that persons who represent themselves as members or officers of a corporation are not so."

In *Peel's Case—Re Barned's Banking Co.*, L. R. 2 Ch. 674, the memorandum of association when brought to the registrar was objected to by him as going beyond the prospectus, whereupon the bearer of it then and there without any communication with the persons who had signed it, made an alteration to remove the objection of the registrar who then registered it in the altered form.

Lord Cairns, L. J., said, the registrar had very properly required the alteration to be made, but censured him severely for having registered it without re-execution in the altered form. But he still held it valid on the statute, saying, that by the Act the certificate of incorporation given by the registrar was not merely a *prima facie*, but a conclusive answer. He says: "When once the memorandum was registered, and the company held out to the world as a company undertaking business willing to receive shareholders, and ready to contract engagements, then it would be of most disastrous consequence if, after all that had been done any person was allowed to go back and enter into an examination, it might be years after the company had commenced trade, of the circumstances attending the original registration, and the regularity of the execution of the document originally received by the registrar."

In that case a shareholder was seeking to have his name removed from the share register. See also *Ennis and West Clare R. W. Co.*, L. R. 3, Ir. Ch. 94.

The cases therefore seem clear that after registration by the act of the appointed authority the certificate is conclusive as to all objections, assuming that the company is one permitted by the Act to be formed. As already suggested, we have no such provision in this country under our Act. Everything is left to the action of the parties themselves, and no conclusive force is given to the registration.

In the case before us we have not to deal with the rights of persons who on the faith of an alleged proper formation of a company with limited liability have been induced to take shares. We are dealing with the case of the five persons who subscribed the memorandum, registered it in the county office, and then claim toll from persons travelling along a highway, which they allege has been conveyed to them as a company. They, and they alone, are asserting their right to have become a corporation under the statute, and their performance of the requirements thereof, which are expressly made conditions precedent must be shewn.

Five persons have signed the memorandum, and perhaps the words of Hall, V. C., may be cited: "Is not an infant a person?" This may be readily conceded in a sense, but we have to decide whether five persons, each sui juris and capable of contracting in the words of the statutory form to take and accept the named number of shares and to pay the calls thereon, have done as the statute requires. We have to decide whether the five persons are legally competent, and whether say four out of the five may be male or female children of 10, 11, 12 and 13 years respectively of age, and if they can write their names it is sufficient.

It was said in a case of *Cork and Bandon R. W. Co. v. Cazenove*, 10 Q. B. 935, that the effect of the statute was to make an infant who was registered owner of shares, liable for calls. This view was dissented from by the Court of Exchequer in *Newry and Enniskillen R. W. Co. v. Coombe*, 3 Ex. 565; and, again, in *North Western R. W. Co. v. McMichael*, 5 Ex. 114, and it was held that the liability was by contract.

Parke, B., in 3 Ex. 574, noticing the words in the Act, "Every person who shall have contracted to subscribe," means every person who shall have contracted to subscribe. "The law is never to be construed so as to affect with liability to a contract, persons incapable of contracting, therefore the liability imposed by this statute, cannot apply to such of the subscribers as are lunatics, infants, or feme covert. It is true that the statute contemplates the case of infants being shareholders, and no doubt they may acquire shares by descent or marriage, but the question here is when an infant has become a shareholder by contract may he not disaffirm it."

He cites *Stonell v. Lord Zouch*, Plowden, 364: "Where Acts of Parliament enjoin the doing of anything which requires sound and perfect reason in the execution of it, the makers of the Act did not intend it to be done by those who have not perfect reason."

Rolfe B. (Lord Cranworth) says (at 576), "When the statute says that all persons subscribing shall become shareholders, it means all persons who by law can enter into contracts. * * * The 14th section says that 'every shareholder may sell or transfer his shares.' Can it be argued that an idiot, a lunatic, or an infant can do so? The difficulty can only be got over when the statute says that 'every person' may do certain things it means every person who is not by law incompetent." * * That is in accordance with the principle recognised in the case cited from Plowden by my brother Parke."

Many authorities are cited.

See also *Leeds &c. R. W. Co. v. Fearnley*, 4 Ex. 26, and authorities cited. In 5 Ex. 114 are the cases *North-Western R. W. Co. v. McMichael*; *Birkenhead L. & C. R. W. Co. v. Pelcher*.

The position of an infant shareholder is very fully discussed both in the argument and judgment; all these cases arose on the forms of pleadings, as to ratification and repudiation by infants.

The judgment of Parke, B., 3 Ex. 123, very fully discusses the law, and the result he there states as to infants purchasing stock. "They have been treated as persons in a different situation from mere contractors, for there they would have been exempt, but in truth they are purchasers who have

acquired an interest not in a mere chattel, but in a subject of a permanent nature either by contract with the company or purchase or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate who has taken possession and become liable to the obligations attached to the estate, for instance, to pay rent, &c., unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age. * * Our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate or any other permanent interest and not deprived of the right which the law gives to every infant of waiving and disagreeing to the purchase, and if he waives it the estate acquired by the purchaser is at an end," &c.

The effect of the decision was to render it necessary for the plea to aver an avoidance or repudiation by the infant. The same was held by the same Court in *Dublin and Wicklow R. W. Co. v. Black*, 8 Ex. 181.

In *Mann's Case*, reported in notes to *Capper's Case*, L. R. 3 Ch. 459, an infant transferee of shares was removed from the register after the winding-up order, as being an infant, and the transferrer held liable—the transfer was treated as a nullity.

Capper's Case follows this. See also *Symon's Case*, L. R. 5 Ch. 298. I also refer to *Merry v. Nickalls*, L. R. 7 Ch. 733, judgment of James, L.J., at p. 748, where he says an infant was utterly incapable of accepting shares: Mellish, L.J., at p. 452. The same case as *Nickalls v. Merry*, in appeal to the Lords, L. R., 7 H. L. 530; Lord Cairns, at p. 541; Lord Chelmsford, at p. 544-5; Lord Hatherley, at p. 548.

Vol. 4 *Bac. Abr.* Infants, p. 347, refers to a case, *Ex p. Barrow*, 3 Ves. 554. A commission of bankruptcy was issued on the petition of A., a creditor. After issue it was discovered he was an infant. Application was made to the Chancellor to allow the required bond to be given by another. The Lord Chancellor, after argument, said that the statute required it must be the bond of the petitioning creditor—that the same person who makes the affidavit must give

the bond, and therefore the commission must be superseded; also *Ex p. Barvis*, 6 Ves. 601. It is again referred to in 1 *Bac. Abr. Bankrupt* 557. An infant cannot be a petitioning creditor because he cannot give a valid bond to the Lord Chancellor: *Lemprière v. Lange*, 12 Ch. D. 676, shews the state of the law as to an infant lessee in possession: *Hargrave v. Hargrave*, 12 Beav., at p. 411.

Taking a view of the authorities most favorable to the plaintiffs we may assume that if the infant had become a shareholder in an existing company, as a railway company, his position would be analogous to that of an infant purchasing an estate and entering into possession; we are to see whether such a principle is to govern this case.

We are inquiring into the legality of the formation of the plaintiff company.

What the infant here contracted to do was to form a company with four other persons for a named purpose, to declare the amount of the capital stock, and to take and accept the number of shares set opposite his name, and to pay the calls thereon under rules and by-laws to be thereafter passed by such company, and the five subscribers were appointed directors.

This seems to me to be clearly an executory contract, one to which an infant, as such, in the absence of confirmation could not be held.

Here the subscription for stock by at least five persons, and the execution of this instrument are made—in the most express terms—conditions precedent to the legal formation of the company.

Has the company been legally formed, and was it in legal existence as such when the conveyance was made to it as a company?

On 27th Nov. 1878 the statutable declaration was made. On the 29th Nov. the subscribers met and resolved to purchase the roads for \$31,000, payable in monthly payments of \$350 each. On 2nd January, 1879—the infancy still continuing—the Hamilton and Milton Road Company convey to the Hamilton and Flamborough Company (the plaintiffs) the roads in question.

I do not see how the fact of the infancy terminating in about a year after this transaction, and the infant in full age fully confirming what was done, can for the purposes of this suit be held to cure the objection.

If there were not a corporation in legal existence at this purchase and transfer, it is not easy to see how any subsequent ratification, &c., can affect the case—the infant shareholder may fully perfect his liability, but what we have to consider is whether the statute has been complied with.

I do not propose to discuss fully the objection to the married woman being one of the five original subscribers, her husband also being one. Conceding her right to enter into any contract respecting her separate estate, her rights to her own earnings, and to invest the same in stocks, or shares of any kind, I am still wholly unprepared to regard her as so completely *sui juris* as to be one of the five persons required by our statute. She has here become the holder of \$1,240 of stock; on this a little over \$60 (5 per cent.) was paid in by her husband to one of her sons as treasurer. She undertakes to pay up the rest when called on. It is said she has separate estate, we are not informed as to its extent.

Under the statute the obligation to pay by her would apparently be unqualified, and could hardly be limited to the unknown extent of her own property.

In the Ontario Married Woman's Act of 1884, 47 Vict. ch. 19, sec. 7, although not governing this subscription is this significant provision. After providing that stock held in her name shall be deemed, until the contrary is shewn, to be her separate property in respect of which so far as any liability may be incident thereto, her separate estate shall alone be liable, it provides that nothing in the Act shall require or authorise any corporation or joint stock company to admit any married woman to hold shares, &c., to which any liability may be incident, contrary to the provisions of any statute, charter, by-law, articles of association, or deed of settlement regulating the company.

This language shows the view of the Legislature in dealing with such a question.

For my part I cannot believe that this married woman on the evidence before us could legally be one of the five members required to organise this corporation.

As already observed this Act contains no clause like the Imperial Acts making the registration, &c., conclusive evidence. Section 145 expressly makes good irregularities in the formation or registration of companies under the Act of 1853, even where the requirements had not been strictly complied with when the companies had *bonâ fide* proceeded with the works, and they shall be held "to be duly organised, registered, constituted, and managed." But nothing therein contained shall be construed to confirm the establishment, &c., of the company when any irregularity has occurred in the formation, registration, or management of the same, unless such company has *bonâ fide* proceeded with the work before the 14th June, 1853.

This provision is very significant, and the *maxim expressio unius, &c.*, may occur to the student of the statute. Some analogous Acts contain provisions somewhat like the Companies Act of 1862.

The Gas and Water Companies Acts, R. S. O. ch. 157. After a municipality have sanctioned the company by by-law which is to be registered with the other documents, then section 6 declares that compliance with the formalities prescribed for the formation of the company shall be conclusively established by publication of a notice in the *Gazette* by the Provincial Secretary.

Co-operative Associations Act, R. S. O. ch. 158, when the Provincial Secretary grants a certificate, which shall be conclusive evidence that the association has been duly registered.

We have now to consider the objection that the amount of stock subscribed was confessedly wholly inadequate to purchase the road.

The price agreed on was \$31,000, the stock \$5,000. The deed of transfer states the price "subject to a certain mort-

gage thereon in favor of the city of Hamilton ;" and that the transferring company had accepted and agreed to the proposal upon condition, that \$31,000 with interest be secured by valid mortgage upon the roads, works and franchises and also on 240 shares of stock in the Barton & Glanford Road Company, and also upon 40 acres part of certain property owned by Mr. R. Waddell.

The mortgage was given by the new company on the roads, tolls, &c., and also a mortgage on the individual property of Mr. Waddell.

On the face of the transaction it therefore appears that the amount of capital stock was only one-sixth of the amount necessary to purchase the road.

It is contended that this is quite immaterial, and that the parties might have legally purchased for cash or in any way by mortgage or otherwise to satisfy the vendors.

It is said in the judgment below, "the mere declaration that \$5,000 shall be the capital stock, when it is not anything like that sum, but a much larger sum, looks like an evasion by the plaintiffs of the terms of the statute, if that provision of the Act applies to the purchase of roads. I am disposed to think it does not, for the sale and purchase of such roads is a matter of dealing and contract between two companies," &c.

I am unable to agree that the statute does not equally apply to the purchase as to the construction of roads.

Section 57 of the Revised Act, ch. 152, repeats the exact words in the case of a purchase of roads as to (1) until the shareholders have subscribed for stock, an amount sufficient in their judgment to purchase the whole of the works, for the purchase of which the company is formed. (2) As to execution of the statutable instrument.

If it be sufficient to have a capital of \$5,000 to purchase a property for \$31,000, of course it will suffice to have stock to only \$100 or \$50; the stock being only created for the purpose of forming a company under the statute limiting the liability of the joint adventurers in a large undertaking to the few dollars worth of stock.

As I read the statute I cannot imagine a proceeding more foreign to its apparent purpose or a more palpable evasion of its provisions.

It appears plain to me that the Legislature designed a stock company and the subscription for stock to be for an amount sufficient to purchase the whole of the works. The words are "sufficient in their judgment." There is no pretence that they considered such a sum as \$5,000 sufficient, as on the face of the bargain and deed of transfer they aver and shew what was understood to be the consideration.

Section 30 provides for the increase of the capital stock if the original subscribed capital be not sufficient. Section 32 enables them to increase the capital by the issue of debentures for sums not less than \$100 each, and not exceeding in the whole one-half of the paid up share capital, or they may borrow on security of the tolls or by issuing new shares.

The issue of debentures to the amount of half of the \$300 now paid in on the \$5,000 original capital stock, would hardly be a very substantial aid to the company.

By section 57, a municipal council may subscribe for and hold stock in any company.

Section 69 contemplates a municipality to hold sufficient stock for the controlling interest in any company.

Section 150 allows the municipality after 21 years from the completion of the work to purchase the stock of the company at the then current value thereof.

These provisions may be referred to for the purpose of understanding the general scope and frame work of the Act, and to support the conclusion that it provides for the creation of a body of shareholders, and an amount of stock reasonably adequate to the making or purchasing of roads; a "Joint Stock Company," as the title of the Act calls it, not a mere private partnership of five persons who go through the form of creating a nominal share capital of one-sixth of the required amount for the purpose of simulating an obedience and conformity to the statute.

It is not to any mortgaging of the tolls that I think the substantial objections point. Behind such mortgage there might properly be a full share capital, which might or might not be necessary to call in.

We cannot read the general provisions of the Act, those already referred to, and others, such as the sale of the undertaking on execution, the winding-up provisions as subsequent legislation, &c., without seeing how many difficult questions may arise.

The learned Chief Justice intimates that the objections taken to incorporation, should be left to some different proceeding against the company.

I fully agree that where letters patent have been obtained, they would be upheld until impeached in some direct proceeding instituted for the purpose.

I think such proceedings might be taken in the present case in the nature of quo warranto, for usurping the functions of a corporation or presuming to act as a corporation without legal right.

The subject is discussed in such books as Grant on Corporations, 281, et seq.; Field on Corporations, p. 525; Dillon on Corporations, sec. 15, 2 Dillon, sec. 805; *Attorney General v. Great Northern R. W. Co.*, 1 Drew. & Sm. 154, before *Kindersley*, V. C.; *Askew v. Manning*, 38 U. C. R. 345, where the authorities are very fully noticed.

But in the present case, I consider that on a denial of the plaintiffs' corporate existence equivalent to the old plea of "nul tiel corporation" it is open to the defendants to shew that the corporate character had never been attained in consequence of the non-performance of conditions plainly required by the Legislature to be precedent to the right to acquire the corporate status. It must be always borne in mind that the statutable formation of the company is left wholly to the action of the parties and at their peril no required proceeding can be dispensed with.

I think they have failed to prove their corporate character and therefore their cause fails.

It is well that the case is not encumbered by the presence of a body of persons who may have become shareholders in what they regarded as a corporation with limited liability. It is wholly a matter affecting the original subscribers.

PATTERSON, J. A.—These are actions to recover tolls from the defendants for passing over a road in the city of Hamilton which the plaintiffs claim by purchase from the Hamilton and Milton Road Co.

The defendants resist the demand upon several grounds which are common to them.

They deny that the plaintiffs are a corporation or have any legal power to acquire or own the road in question; they deny that the Hamilton and Milton Road Company had any title which they could convey to the plaintiffs, and in support of this last objection they attack the validity of the incorporation of two other companies by the union of which the Hamilton and Milton Road Company was formed; and they have some other objections founded on the provisions of the general Acts respecting joint stock companies for the construction or purchase of roads, and on the dealings between the Hamilton and Milton Company and the city of Hamilton.

The first objection, if sustained, will by itself defeat the actions; but before considering it I shall refer as briefly as may be to the others which go to the root of the right of any company to demand tolls in respect of the roads in question.

The statutes under which the questions arise are the Act of 1853, 16 Vict. ch. 190; C. S. U. C. ch. 49; the amending Act of 23 Vic. ch. 54; and the R. S. O. ch. 152.

All the companies were formed and are claimed to have been incorporated under these general Acts.

The Act of 1853 provided, in section 4, that before the road or other work should be commenced, and in order to afford a sufficient guarantee to the public that the company was not a fictitious one, and that the road or other work

was intended to be proceeded with, the company should subscribe a sufficient quantity of stock to amount to a sum adequate in their judgment to the construction of the road or work, and execute an instrument according to the form or to the purport of that contained in a schedule, and pay six per cent. upon the amount of the capital stock mentioned in the instrument, and register the instrument and the treasurer's receipt for the six per cent.; and (by section 5) that where the requirements of the preceding section had been complied with, the company should thenceforth become and be a chartered and incorporated company. The form in the schedule required a description of the line of the intended road as well as of the commencement and termination thereof, differing in this respect from the former act 12 Vict. ch. 84, which had only called for a statement of the commencement and termination.

The C. S. U. C., ch. 49, sec. 13, omitted the preamble to section 4 of the Act of 1853, and declared that "No company shall be incorporated under this Act, until," &c., then following sections 4 and 5 of the former Act.

These Acts did not provide directly for the formation of companies to purchase roads already constructed, and that want was supplied in 1860, by 23 Vict. ch. 54, secs. 5, 6, and 7, which are now found as sections 56, 57, and 58 of R. S. O. ch. 152.

The terms of these sections are very much like those respecting companies formed for the construction of roads, &c., to which I have referred. Section 6, or 57, declares that no such company shall be incorporated under the Act until the stockholders have subscribed for stock in amount sufficient in their judgment to purchase the whole of the work or works for the purchase of which the company is formed; making similar provisions for registering the instrument and receipt for six per cent. of the amount of the capital stock; and declaring (sec. 7 or 58) that thenceforward the provisions relating to companies formed for the construction of roads, &c., shall apply.

Provision was also made for the union of any two or more companies formed for the construction or purchase of roads intersecting or contiguous to each other. 16 Vict. ch. 190, sec. 19 : C. S. U. C. ch. 49, sec. 57 : R. S. O. ch. 152, sec. 60.

In September, 1853, a company was formed, called the Hamilton, Waterdown, and Carlisle Road Company, for the construction of a road from the city limits to the Villages of Waterdown, and Carlisle ; and in December of the same year another company called the Hamilton and Brock Road Company was formed, for the construction of a road from another point outside of the city limits to a place on the Brock road.

The instruments executed and filed for the purpose of incorporating these companies contained no description of the lines of the roads proposed to be constructed. The defendants now urge that, for that reason, the companies were never validly incorporated.

I merely mention this objection without at present discussing it, because the Act of 37 Vict. ch 73 (O.) which I shall presently notice renders it, in my opinion, immaterial. The roads were in fact constructed.

On the 25th of May, 1867, the Hamilton, Waterdown, and Carlisle Road Company passed a resolution abandoning part of their road, including the end of it next to the city ; and on the same day a company was formed called the Hamilton and Milton Road Company, for the purpose of constructing a road from Hamilton to Milton by way of the abandoned part of the other company's road.

The right of the one company to abandon a part of their road and of the other to assume it is questioned. I pass that point also for the present without discussion.

Then we have, on the 24th October, 1867, a resolution of the Hamilton, Waterdown, and Carlisle Company to unite with the Hamilton and Milton Company, and a deed carrying out the union executed by both companies. The united company assumed the name of the Hamilton and Milton Road Company, and that company again

in the following December united with the Hamilton and Brock Road Company, forming another company under the name of the Hamilton and Milton Road Company, the third and last of that name.

This union is attacked on the ground that the roads for the construction or purchase of which the two companies were formed were not intersecting or contiguous roads. These roads, as I understand the instruments of incorporation and the plans produced in evidence, are, both as projected and constructed, more than a quarter of a mile apart at their nearest points. The contention that they are not contiguous has not, in my judgment, been successfully answered, but as this objection seems also to be removed by 37 Vict. ch. 73 (O.) I pass it over for the present without stopping to discuss the effect of the want of contiguity.

Then, suspending judgment on these objections, and assuming all things so far to have been validly done, we find, at the end of 1867, one company owning two roads, both of which are altogether outside of the city, and which reached to or near to the city limits at places something more than a quarter of a mile apart.

In June, 1869, an agreement was made between the road company and the city that the company should extend the roads into the city to a named distance, and should build and maintain a good bridge over the Desjardins Canal, the city advancing \$5000, at one per cent. per annum, as a loan to the company, to aid in the work; and, inasmuch as it was not lawful for the company to construct the road within the limits of the city except under permission by by-law, (C. S. U. C. ch. 49, sec. 6: R. S. O. ch. 152, sec. 8), the council passed the by-law, No. 7, which is in evidence, enacting "that the said, The Hamilton and Milton Road Company be, and they are hereby permitted and allowed to continue and extend both their said toll roads from such points as the said company may select at or near the easterly termini of said respective roads southerly into the City of Hamilton as far as the easterly limit of what is commonly known as the ordnance lands on Burlington Heights aforesaid."

Some objections have been urged against this agreement and by-law, particularly to a clause by which the company forego, in favor of citizens of Hamilton, the right to charge extra tolls for crossing the bridge; (C. S. U. C. ch. 49. sec. 78 : R. S. O. ch. 152, sec. 87), and it is said that the by-law, by implication, designates a route through the city different from that on which the road has been constructed. Wherefore, (it is argued) the road has not the permission by by-law which the statute requires. I do not read the by-law as restricting the company to any particular route. There is in the agreement a stipulation, apparently exacted by the company, that a by-law shall be passed altering the line of a highway so as to pass at a grade over the railway, instead of under it, and the by-law accordingly so enacts, but it does not profess to bind the company to take or adhere to the precise line contemplated in that stipulation, nor even to use any highway of the city. The permission is general in its terms. If any understanding was, or was supposed to be, violated in making the road, it was for the city to interfere, as seems to have been done when a supplementary agreement was taken from the company in January, 1870, respecting another part of the road.

Were it necessary to pronounce upon the validity of the by-law, I should, as my present opinion is, be content to refer to and adopt the judgment of Mr. Justice Rose in the case of these Plaintiffs v. *Binkley*, 9 O. R. 621; but I cannot understand on what principle the defendant can be allowed to contest it in this action.

Then we have another objection based on the allegation that the extension into Hamilton was not made within two years after the incorporation of the company, whereby (it is argued), the company became extinct by force of the 71st section of C. S. U. C. ch. 49, which is sec. 78, of R. S. O. ch. 152.

This section, in connection with the 11th section of 16 Vict. ch. 190, which, in the slightly altered form it assumed in 29 Vict. ch. 36, sec. 4, now forms sec. 30, of the R. S. O.

ch. 152, was a subject of discussion in *Yorkville and Vaughan Plank Road Co. v. Baldwin*, 20 C. P. 312. The sections undoubtedly present difficulties, particularly with regard to their operation upon companies owning one or more roads that have long been completed and desiring to extend or alter them. I am glad to feel that I am not now under the necessity of forming an opinion as to their scope and meaning.

That question, together with all the others raised concerning the valid incorporation of the Hamilton and Milton Road Company and the right of that company to own the roads, to extend them into the city, and to unite them before crossing the canal, must, in my opinion, be taken to be concluded by the act of 1874, 37 Vict. ch. 73 (O.), which was passed to give effect to an arrangement between the company and the Desjardins Canal Co., the Great Western Railway Co., and the town of Dundas, with respect to the bridge over the canal, the duty and burden of maintaining it being cast upon the company and made a charge upon the roads, property and revenues of the company, and part of the arrangement consisting in the closing for a distance of one chain on each side of the canal of the then existing highway leading across the bridge called the High Level bridge, that highway being, as I understand, York street.

It would be impossible to hold, in the face of that statute, that the Hamilton and Milton Road Company was not an existing corporation, or that it did not lawfully own and hold the roads, consisting of the two roads originally known as the Hamilton and Brock road, and the Hamilton, Waterdown and Carlisle road, with their extensions into the city of Hamilton, which extensions united at the new bridge, and from that point formed one highway upon which the toll gate at which the defendants refuse to pay is placed. It will be noticed that these extensions were not undertaken by the company as new roads; but whether at the time it was or was not strictly within the powers conferred by the general Act to construct the extensions, the work was undertaken in assumed pur-

suance of those powers, and the Legislature, in the Act of 37 Vict. ch. 73 (O.), which had more immediate reference to the extensions than to the original roads, obviously dealt with them as parts of the roads which the original companies had been formed to construct.

The statute would thus also afford an answer to an objection based upon an alleged break in the continuity of each road, one by what is called the upper bridge over the old canal, and the other by the lower bridge, and, as the defendant Flatt asserts, by the interposition of a part of the Hamilton and Nelson road.

The learned Chief Justice in the Court below pointed out that the objection assumed that the road and the extension formed two roads, and not one road, a position which I agree with him in holding untenable as soon as the extension is recognised as legally the road of the company. I cannot add anything to the reasons given by him for holding that a bridge belonging to the county cannot be treated as a break in the road of the company, and I should probably also agree in holding that the extension must still be deemed a continuation of the original road even though in order to reach the bridge from which the extension started it was necessary to pass over a part of the Hamilton and Nelson road, as was the case in 1871, when in deference to a decision of the Judge of the County Court presiding at the Quarter Sessions, though under protest, the company discontinued the collection of tolls on the extension. But after that decision we are informed by witnesses, one of whom is the secretary of the Hamilton and Nelson Road Company, that the Hamilton and Milton Company constructed an independent road all the way from the Willow toll gate to the bridge.

My conclusion, so far, is, that if the Hamilton and Milton company had been asserting the right now asserted by the plaintiffs, there has been nothing shewn which would afford a valid defence to either the defendant Townsend or the defendant Flatt, and I have considered it sufficient to state my views somewhat concisely because

I agree in the main with those more fully expressed on this part of the subject by the learned Chief Justice in the judgment now in review.

The remaining question is the status of the present plaintiffs.

R. S. O. ch, 152, enacts in section 56 "that any number of persons not less than five may form themselves into a company for the purpose of purchasing any planked, macadamised, or gravelled road, not less than two miles in length, constructed by any company on, along, or over," &c.

By section 57, no such company shall be incorporated under the Act: "1. Until the shareholders shall have subscribed for stock in amount sufficient in their judgment to purchase the whole of the work or works, for the purchase of which the company is formed: 2. Nor until they have executed an instrument to the purport of schedule A annexed to this Act, with the necessary alteration in the statement of the purpose of the company: 3. Nor until the company or some one of their number, or the directors named in the said instrument, have paid to the treasurer of the company six per cent. upon the amount of the capital stock mentioned in such instrument, and have registered such instrument with a receipt from the treasurer of the company for such payment or instalment, by leaving the original instrument and receipt with the registrar of any one county or other registration division in which such road or other work connected therewith is wholly or partially situated."

The defendants dispute the incorporation of the plaintiffs, and the plaintiffs are required to prove that they complied with all that the statute makes essential to their incorporation.

An instrument in the statutable form was executed by five persons and was registered. It bears date the 27th of November, 1878. It describes the purpose of the company as "purchasing the roads and works of the Hamilton and Milton Road Company." It declares the capital stock of the company to be \$5,000, divided into 250 shares of \$20 each, and contains an agreement by the five parties to take and accept the number of shares set by them opposite their respective signatures, and to pay the calls

thereon according to the provisions of the Act and the rules, regulations and by-laws of the company to be made or passed in that behalf; and it nominated five persons, who were the only subscribers, to be the first directors of the company.

Thus the second of the three requirements of sec. 57 was apparently complied with. So was the third, because the instrument was registered, and with it was registered a receipt dated the 29th of November, by which one of the subscribers, styling himself "Sec. and Treas. of the H. & F. Road Co.," acknowledged that he had received from another subscriber \$300, being six per cent. upon the amount of the capital stock mentioned in the instrument of incorporation.

It was necessary, however, that the first requirement, which is the substantial one, should be complied with as well as the others which partake more of the nature of formalities.

The first thing required is, the subscription for stock in amount sufficient, in the judgment of the persons associating themselves as the company, to purchase the whole of the works for the purchase of which the company is formed.

The price of the works was \$31,000. I do not find it stated in so many words by any witness or in any document that that price had been ascertained before the execution of the instrument of incorporation of the plaintiff company; but on the other hand no one hints that it was not so, and all that we know of what took place makes the conclusion that it was so ascertained a matter of course. The formal resolution of the Hamilton and Milton Company to sell to the plaintiffs for \$31,000, bears date the 1st of February, 1879, only about two months after the date of the instrument of incorporation, and it bears internal evidence that it was only the formal expression of an earlier agreement, for it makes the purchase money bear interest from the 1st of the preceding January. In fact the deed conveying the property from one company to the other is

dated the 2nd of January, a month before the resolution of the directors and three weeks yet further in advance of the confirmation of the action of the directors by the meeting of stockholders; and the resolution of the stockholders of the plaintiff company to accept the offer of the Hamilton and Milton Company by purchasing for \$31,000 was passed on the 29th of November. This was the very day on which the instrument of incorporation was filed, for though the instrument purports to have been executed on the 27th, the receipt for the \$300 which was filed with it is dated the 29th.

No part of the \$5,000 was paid except the \$300. The purchase was entirely on credit, the money being secured by a mortgage of the property purchased, and of certain private property; and that that was the method contemplated when the instrument of incorporation was framed is clear from what actually happened, and from the absence of any hint from any witness that the transaction as carried out was not precisely what was always intended.

Indeed it was so treated in the argument before us, the contention for the plaintiffs being that the amount of \$5,000 should be held to be not only sufficient in the judgment of the corporators to purchase the whole of the works, but sufficient in fact, because with no more capital than that the works were purchased, an argument which would have had the same force if the nominal capital had been \$5 instead of \$5,000.

It is obvious that the sum named in the instrument as the capital of the company was fixed without any reference to the price to be paid for the works. They were purchased on a promise to pay \$31,000, failing the fulfilment of which they might revert under the mortgage to the vendors, or perhaps be sold to some other corporation.

The transaction, although it might be unobjectionable between persons dealing in their own right with their own property, is very far from what is contemplated by the statute on which the plaintiffs have to rely for their corporate existence.

The careful wording of the section, "Sufficient to purchase the whole work,"—leaves no room for the suggestion that a subscription to an amount sufficient to pay a cash instalment of, say half the entire price, time being given for the other half, would be enough. A fortiori when the credit was to be for the whole price would it be impossible to hold that a nominal subscription satisfied the statute, and was sufficient to purchase the *whole work*. Yet that is in substance what is argued.

In my opinion the first requisite to incorporation under the statute, namely, the subscription of stock to an amount sufficient in the judgment of the promoters of the company to purchase the whole of the works for the purchase of which the company was formed, has not been proved but has been negatived.

But it is further objected that there were not five subscribers to even the nominal capital of \$5,000.

The persons whose signatures the instrument bears are Mr. R. R. Waddell, his wife, and two of his sons, each for 62 shares, and a relative for two shares.

One of the sons was under age.

Mrs. Waddell is said to have had separate property.

The son became of age before the present cause of action arose, and he clearly ratified his subscription by his acts as a member of the company, though not by paying any part of it, and in a winding up proceeding he certainly would be liable as a contributory.

We must, however, in my opinion, look at the matter as of the time when the instrument of incorporation was filed.

The terms of the statute are peremptory. No company *shall be incorporated* under the Act until the three requisites of sec. 57 are fulfilled. This is emphasised by sec. 6, which by a reference in sec. 58 is applied to companies like the plaintiffs, and which declares that when the provisions of the preceding section have been complied with the company shall be a chartered and incorporated company.

If, therefore, the incorporation did not take effect upon the filing of the instrument, it never took effect.

If I am right in this, then the question is, what is meant, in section 57, by subscribing for stock?

The word is evidently used in the sense of "promising by writing the person's name," which is a definition given in the dictionaries, and having regard to the object of the enactment, the Legislature must be taken to have intended that the subscription should be such as to create a legal obligation to pay the money. This, which would be a plain enough inference, is made certain by the form given in schedule A, which embodies an agreement to take the shares and pay the calls. The enactment is in effect that at least five persons must contract for the payment of the requisite amount of capital. The five persons must therefore be persons capable of binding themselves by contract. We have, as parties to this instrument, at most, four such persons.

I think there are really only three, because the Legislature, even in the late Act of 1884, 47 Vict. ch. 19 (O.), has stopped short of enabling a married woman to bind herself personally by her general contract, and in Mrs. Waddell's case, no question of ratification is open. But I do not think it necessary at present to discuss more fully the effect of her signature to the document.

The plaintiffs fail, in my opinion, upon the issue touching their corporate character.

I have considered the question entirely upon what appears to me to be the proper construction of our statute, but my views are borne out by the authorities which his Lordship the Chief Justice has reviewed.

I agree that we should allow the appeal, with costs.

BURTON and OSLER, JJ.A., concurred.

Appeal allowed, with costs.

SANDERSON V. MCKERCHER.

Resulting trust—Redemption—Lien for money advanced.

A resulting trust arises only in favor of a party paying the whole or an aliquot part of the purchase money: and in such case the trust is of a part of the purchased estate proportioned to the sum paid. No such trust arises from the circumstance of a man making advances on behalf of another who has agreed to buy the estate.

The defendant, whose daughter had married a brother of the plaintiff and who was an executor named in the will of S., the father of the plaintiff, took a more than common interest in the settlement of his testator's estate. In consequence he suggested to the plaintiff the desirability of his purchasing the estate of one G. situated near the S. homestead; as by so doing the plaintiff could retain the G. farm leaving the homestead to be equally divided between his two brothers; saying in answer to plaintiff's objection of want of means that he, defendant, would assist him with his payments.

The purchase was accordingly effected and plaintiff and defendant paid up the purchase money, but not in any agreed proportions, some of defendant's advances being made partly in cash and partly in kind and the conveyance was made to the plaintiff, the defendant subscribing as the witness and retaining possession of the deed.

On an attempted settlement of their respective rights the defendant under the circumstances insisted that he and the plaintiff had purchased on joint account and that there was a resulting trust in his favor as to a moiety of the land and that he was entitled to the then value thereof and on proceedings taken by the plaintiff, ARMOUR, J. gave judgment in favor of the defendant's contention.

On appeal this Court *Held*, [HAGARTY, C. J. O., dissenting,] that on the evidence there was not a resulting trust; that all defendant could claim was a lien for the amount advanced by him; and a reference was directed to take the account and if the amount found due should not be paid in six months that the estate should be sold; the amount due defendant paid to him and the surplus, if any, paid to the plaintiff.

THIS was an appeal by the plaintiff from the judgment of Armour, J., and came on to be argued before this Court on the 13th of May, 1886.*

Moss, Q. C., and Garrow, Q. C., for the appellant.

Macleanman, Q. C. and M. I. G. Cameron, for the respondent.

The facts of the case and the points raised are fully stated in the present judgments.

*Present.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

November 4, 1886. PATTERSON, J. A.—The land in dispute in this action is a farm of 90 acres, being 70 acres of lot 20 and 20 acres of lot 19 in the concession C, of the township of Howick. It was bought in March or April, 1882, from one Gibson and conveyed by him by deeds dated 3rd April, 1882, and 6th April, 1882, to the plaintiff William Sanderson, who brings this action for the purpose of having it declared that the defendant William McKercher who claims an interest in the land is not entitled thereto.

The defendant sets up that the purchase from Gibson was a joint purchase by him and the plaintiff, and that the conveyances were taken by the plaintiff in his own name upon the express agreement that he would execute proper conveyances of an undivided half of the land to the defendant when the defendant desired it; and also avers that there is a resulting trust in his favor for an undivided half of the lands by reason of his having paid one half of the purchase money.

The plaintiff admits that the defendant paid part of the purchase money, but asserts that that was by way of loan to him.

This is a general statement of the case made on each side by the pleadings.

At the trial before Mr. Justice Armour at Goderich, on 15th October, 1885, both parties were examined and other evidence was given.

The judgment as formally drawn up finds :

1. That the plaintiff and defendant jointly purchased and are jointly entitled as tenants in common to the lands in the pleadings mentioned, and that the plaintiff is a trustee thereof for the defendant as to one equal undivided moiety thereof; and that each was and is liable and bound to pay one half of the purchase money paid, and to pay for the said lands, including the amounts outstanding upon mortgage against the same when such purchase was made, and the conveyance to the plaintiff obtained, and the amount then unpaid to the Crown upon that part

of the said lands then unpatented, and doth order and adjudge the same accordingly.

The conclusions of the learned Judge upon the questions of fact and of law were expressed in a written judgment delivered on the 7th of November, 1885, in these words:

"The conclusion I arrived at upon the hearing was that the plaintiff and defendant had purchased the land in question upon joint account, and a subsequent careful perusal of the evidence has rather strengthened that conclusion. The payment of the purchase money, the mode of payment, and the proportions in which it was paid, the dealing with the land, the conduct of the parties as to it and as to the rent of it, strongly corroborated the defendant's contention, and were, to my mind, capable of but one interpretation, and I would have then made the decree which I now do, but for the strenuous insistence of the plaintiff's counsel that the Statute of Frauds stood in the defendant's way. I have given as much time as I had at my command to the investigation of this contention, and after the best consideration I have been able to give to it, I have come to the conclusion, principally on the authority of *Williams v. Jenkins*, 18 Gr. 536. and the cases there cited, that this contention ought not to prevail. I would have been glad to set forth at greater length my reasons for this conclusion but I could only do so by throwing the parties over the Michaelmas sittings for an appeal from my views."

Having only this rather concise and general statement of the views on which the judgment proceeded, we have to form our own opinions of the value to be accorded to the evidence of one witness or another, as well as upon the effect of the evidence as a whole.

The great contest is upon the point which, as I have just noted, is made by the pleadings, namely, the terms on which, as between the plaintiff and the defendant, the land was acquired from Gibson. On this point we have contradictory evidence, but the surrounding facts are not really in dispute, and are not difficult to gather from what is told us by the parties.

The defendant was a neighbour and an old friend of Henry Sanderson, who died in January, 1876, leaving a will, made shortly before his death, by which he appointed the defendant and another neighbour his executors.

One provision of the will was that the testator's farm of 275 acres should be divided, in parts of equal value, among his three sons, Matthew, William, and Alexander, when Alexander should attain twenty-one, which date was mentioned in the will as the 15th of November, 1884.

William is the present plaintiff.

The farm which is the subject of this action was offered for sale by its owner Mr. Gibson, who was about to go to Manitoba, for \$3,600.

At that price it seems to have been considered something of a bargain, at least by the defendant.

The defendant says he had offered it at \$3,600, on behalf of Gibson to one Moffatt. Gibson does not recollect that circumstance and it is not of much direct importance.

The defendant's account of the circumstances leading up to the purchase is thus given in his evidence at the trial :

"On the way home from Wroxeter I was going along with the plaintiff in this case. I told him that the Gibson farm could be bought for \$3,600, and that I thought it was cheap. I had been speaking to Moffatt about it, and he was to let me know on Saturday whether he would take it. We talked on about it. I told him first if he and his brother would go into it and would buy it it would be a good investment; that if he, his brother, my two sons and myself went into it it would be a good speculation. He said he thought it was cheap. I told him then he had better see them before Saturday—that is, my sons and his brother, and by that time I would have a definite answer from Moffatt, and if they would agree we would buy the place.

On Saturday I asked him what his brother and our boys told him; he said he only saw my son Alexander, and that Alexander told him we had as much land now as we could work, and that he would not be willing to go in for it only on speculation.

Q. What did you say? A. I said, no matter, I will go in with you for it and put your name down in the writings, and if you want it when you are making a division of your homestead property you can have it.

Q. You were one of the executors of the father's will?
A. Yes.

Q. There were how many sons? A. Three sons, Sandersons.

Q. Matthew Sanderson is a son-in-law of yours? A. Yes.

Q. What did you say to him? A. When they would divide the homestead property he might have this lot if he wanted it; have this Gibson plot.

Q. Did you mean the whole of the lot? A. I meant the whole of the lot; that he could have the whole lot if he wanted it when the division was made.

Q. What were they to pay you for it? A. To pay me half the value of the property.

His Lordship. Was that what you meant? A. That is what I meant, of course; no mistake about it.

Q. You said just that he might have it? A. Yes.

Examination continued:

Q. That is what you meant? A. Yes.

Q. Was that all the conversation you had at Wroxeter that day? A. No; we saw Gibson immediately after that. George Moffatt wanted to buy it, but I did not think I had anything to do with that. I had promised to sell to John Moffatt, but didn't consider I had anything to do with George Moffatt; I went in to see if John Moffatt wanted the place; he refused to take it. When I came out again Thomas Gibson was there, and we agreed with him to buy the place; he said he would only want \$1,500 down; there was a mortgage of \$1,100, and there was some money due the Crown for the 40 acres that was not deeded; there was also interest due on the mortgage at that time.

The plaintiff does not admit that the defendant was to have any interest in the property. His version of the transaction is sufficiently indicated by the following extract from his evidence as reported:

Q. Was there an agreement between you and the defendant that he should have an interest in this land? A. No.

Q. What was the agreement? A. He told me that Gibson would sell the place, and asked me and my brother to go in and buy it, and not to divide the homestead in three parts, because he said it would spoil the homestead; I told him that we could not; he said that he was building a house, but that he would help all he could; I told him all right; going home he said for me and his son Aleck to go in and buy it; I saw my brother about it, and he said he did not want the place.

Q. Is that the first occasion ; the occasion you speak of ?
A. He wanted me to go in with his son and buy the place ; I saw Matthew that night.

Q. What did you tell Matthew ? A. I said that he wanted me to buy the place ; he said no ; he said that we had more land than we could pay for ; I told him that McKercher said that he would help ; he said that he didn't want anything out of the place ; I asked him if he was willing for what money we had to go upon the place ; he said he was, but that he didn't want anything out of the place ; I said that McKercher wanted me and his son to go in ; he said I could do as I liked ; Aleck McKercher said that he did not want to go into it ; he said if they went into it for speculation it would be a different thing, but that they did not want any more land ; he said, " If you want it, it is all right ;" but they did not want it ; I told him what his father said ; he said, " If you want it it is all right."

Now without detailing in their proper order some other facts to which I shall advert by and by upon which questions under the Statute of Frauds, and some other questions of law, have been raised, I pass from the date of the purchase from Gibson, which was at the end of March, or beginning of April, 1882, to the time when the division of the Sanderson homestead was effected. It was attempted in September, 1884, or some preliminary settlements were then attempted, for Alexander was not quite of age, and was carried out in April or May, 1885. William the plaintiff sold his share to his brothers, a small part to Alexander and the greater part to Matthew, so that the homestead was divided into two parts, and not into three. Then arose the dispute about the Gibson farm.

It had been valued in the purchase from Gibson at \$3,600. It is not quite accurate to say that it had been sold and bought at that figure. It was subject to a mortgage for \$1,100 principal with \$88 of overdue interest, and for a part that was unpatented there was due to the Crown \$82. Thus the incumbrances amounted to \$1,270, and they had to be assumed by the purchaser, leaving \$2,330 as the price of Gibson's equity of redemption. This sum was to be paid, \$1,500 in cash, and \$830 by four promissory notes.

Some money was borrowed to make up the \$1,500 payment, and afterwards repaid. The payments on this account for principal and interest, and the other moneys paid, whether for the \$830 of notes, or for interest on the mortgage, or for some outlay on the farm, came partly from the rent of the farm which was held under a lease made by Gibson till March or April, 1885; partly from money furnished by the defendant and partly from money furnished by the plaintiff, or furnished on his account by Matthew Sanderson who lived on the homestead.

The plaintiff claimed that the Gibson farm was his, and treated the defendant's payments as advances made for his assistance, which he had to repay with interest; while the defendant insisted that they had bought as tenants in common; that the plaintiff had no right to more than an undivided moiety; and that the defendant was not bound to let him have the other moiety, but was at liberty to hold it for an enhanced price.

Looking at this dispute in the light of the evidence of the parties which I have read, and of the facts I have stated, and without any present reference to the other facts or to the questions of law yet to be dealt with, the result for which the plaintiff contends seems to me to be unavoidable.

Take the defendant's own statement, which is, that when the first suggestion of a purchase of the land by his sons and the Sandersons as a speculation was not entertained, he made the offer on which the plaintiff acted, namely, that he would go in with the plaintiff, and that if the plaintiff wanted the farm when the division of the homestead was made he should have it.

We must, of course, not lose sight of the relation in which the defendant stood towards the Sanderson family as their father's friend and their own; as one of the executors, who although not charged by the will with the duty of dividing the homestead among the boys, yet considered, as he tells us, that that was his duty, his understanding in all probability having been shared by the tes-

tator himself though not so set down in the will, and having, as the father-in-law of Matthew, something of a personal interest in the division being made to the best advantage. Nor ought we to overlook the fact that although the arrangement was between the defendant and the one Sanderson only, the defendant shews that they had the exigencies or the convenience of the family in view. This appears from the extract I have read from his evidence at the trial, but perhaps more plainly from the language of his preliminary examination, where he is reported to have said :

“ When plaintiff said that my son Alexander said to him that they would only go into it for speculation, I said no, rather that I would go in with him, and that we would put his name in the deed, and when they were dividing the homestead they could have this if they wanted it ; I said to him when they were dividing they could have this land, and it would save making fresh writings ; this is all I can recollect of being said ; I intended that if plaintiff and his brother took this land that they should pay me for my half ; I can't say whether or not this was mentioned.”

What was left unexpressed in the defendant's offer, as he states it in his evidence, was the terms on which the plaintiff, if he wanted the whole farm, was to have it; but taking the offer to have been made in language like that in which the defendant now relates it, there is to my mind no difficulty in putting in words what must at the time have been understood. The defendant says he meant that he was to be paid half the value of the farm. He does not say that he told that to the plaintiff. I have no idea that the plaintiff so understood it, and I do not believe that the defendant meant at the time or thought of any such thing. He was looking forward for more than three years and a half, and was speaking of a farm which was not likely to change in value except as the market price of such land might fluctuate, being held under a lease with four years yet to run. The proposition as he would now have it interpreted may be fairly enough stated in this way : my sons will not touch the land unless by way of speculation ; you and I

will buy it and hold it at all events until the time comes for dividing your homestead, and if you then want it all you shall pay me half its value at the time. We are now getting it cheap because Gibson wants money, but I am to be free to make a profit by charging its full value at the time.

It is most unlikely that the plaintiff would understand the offer in this way. All the probabilities are against it. The offer would be naturally understood to be that, in the event of the plaintiff desiring to retain the whole, the purchase should be treated as his purchase, and the money paid by the defendant as money lent, whether the land had in the meantime risen or fallen in value. I should without hesitation find as a fact that that was the sense in which the defendant intended his offer to be understood, even if he in his private thoughts supposed, which I do not believe he then did, that it was capable of two meanings.

This is, I think, the correct understanding of the defendant's own evidence; and when we look at that of the plaintiff and at one or two other undisputed facts, we find it strongly supported.

One fact is the taking of the conveyances from Gibson to the plaintiff alone. The defendant shews that that was part of his offer. "I will go in with you for it and put your name in the writings," &c., making clear the connection of the purchase with the prospective division of the homestead. Counsel suggested, in argument before us, that the deed was taken in the plaintiff's name because the defendant had been negotiating with Moffatt as agent for Gibson, and so did not want to appear to Gibson as the purchaser. But the defendant gives no countenance to that suggestion. On the contrary, he is particular to shew that Moffatt would not buy; that Gibson knew that; and that he bought at the same price at which the farm had been offered to Moffatt. The only shadow of foundation for the suggestion that I can find in the evidence is an expression in the defendant's preliminary examination, but

he clearly shews in another passage that it is only a shadow. I shall read the two passages :

" There was no reason for withholding from Gibson that I was interested in the land, only that it might appear strange to Gibson, as he had employed me to sell the land to John Moffatt. * * After I found out that John Moffatt did not want the place, I did not care how the thing went, and did not care then if Gibson knew that I was interested in the purchase, as a reason for saying that Gibson knew that I was interested in this purchase, I was selling him two heifers," and so on.

The defendant seems, in these passages, to be endeavoring to shew that Gibson was mistaken in believing, as he swears he did, that the plaintiff was the sole purchaser from him. He certainly is not putting forward the attempt to sell to Moffatt as a reason for omitting his own name from the deeds, and the fact of the form of the conveyances, strengthened by the terms in which the defendant recounts his proposal, continues to form a very strong piece of evidence against the defendant.

The plaintiff's version of the transaction which denies to the defendant any interest in the purchase, and is in this respect directly opposed to what the defendant asserts, would probably be found if it were worth while to discuss it at any length, difficult to reconcile with all the facts before us. It has the support of evidence which, to one who only reads the report without seeing the witnesses, seems very cogent, particularly the direct and very clear evidence of Gibson, who, though examined on a commission, was examined *vivâ voce* and cross-examined ; and it has the support of the *primâ facie* import of the conveyances. It was with reference to this issue that most of the witnesses were called, and the question was left to depend on the view to be taken of the evidence as a whole. I am not about to discuss the evidence or the issue. I assume, for my present purpose, the defendant's version to be the correct one. Yet I am not convinced that, even in the face of that assumption, it would be fair to regard the

plaintiff's evidence as dishonest or as necessarily irreconcilable with that of the defendant.

The agreement being left to depend on loosely worded conversations, we need not be surprised to find that the recollection of it by each party is to some extent influenced by the point of view from which he regarded it.

The plaintiff may have all along had in contemplation the owning of the whole land, and from that reason may have thought little, or not thought at all, of the defendant having even a defeasible interest in it, but have looked on him as merely advancing money as a disinterested friend, though it may be crediting him with unusual simplicity, and perhaps exercising a little of the charity that thinketh no evil, to assume that he believed the defendant to be paying money time after time on his behalf without taking any acknowledgment or security from him, while the defendant, whose security was the interest, permanent or defeasible, which he was to have in the land, would be sure to remember that feature of the bargain.

The practical result is the same whether we take the plaintiff's or the defendant's version. The land remains vested in the plaintiff, and he has to repay the defendant his advances and interest.

Then has the defendant any stronger case in law than he seems to have made out on the facts?

The plaintiff takes his stand upon the conveyances from Gibson, and the onus is on the defendant to prove an equitable title.

First it is argued that a resulting trust was created by his payment of a part of the purchase money.

The judgment could scarcely be supported in its present shape upon this ground unless upon an accurate taking of accounts between the parties it appeared that they had paid equal amounts. That might or might not prove to be the case. The inquiry would be complicated with matters respecting which we are not fully informed. The defendant produces a statement shewing that money to the amount of some \$2,700 has been paid, and that he paid a

little over half of it. But the money he paid is said to have included the rent, which all went through his hands and which belonged as much to the plaintiff as to him. Then the \$2700 included interest and other things outside of the purchase money which was only \$2,330, and there would something turn on the question whose was the sum of \$1500 that formed the cash payment to Gibson. It was borrowed money, but when paid to Gibson it was the money of the borrower, (*Owen v. Kennedy*, 20 Gr. 163) and some of the payments set down in the accounts produced by the defendant were not payments to Gibson, but repayments to the strangers who lent the money.

We are obviously unable to determine at present in what proportion the defendant could claim if he were entitled to assert a resulting trust. But it seems impossible to maintain a title of that character against the plaintiff.

Resulting trusts, as they arise from an equitable presumption, may be rebutted by parol evidence shewing the intention of the person who advanced the money.

I have sufficiently discussed the parol evidence in this case, and it is only putting my conclusion in other words to say that the payments made by the defendant are shewn to have been made as purchaser on his own behalf, only in the event of the plaintiff not desiring to retain the whole farm, and that therefore, in the event that has happened the trust is rebutted.

That is the result of the agreement on which the farm was purchased and which we may deduce, as I have shewn, from the defendant's own evidence. But when he shews that the destination of the land was at the time of the purchase the subject of an agreement which included the taking of the conveyance in the plaintiff's name, we have an express and not an implied trust, and the defendant has to encounter the Statute of Frauds. He has no written evidence to satisfy the statute, and it may be questionable whether he has made a case to enable him to establish an agreement without written evidence. If the

right to the land turned upon this point I should desire to consider it more maturely. The defendant undoubtedly had such apparent enjoyment of the land as was evidenced by his receipt of the rents as long as the term lasted. It may reasonably be urged that the receipt of the rents was equivalent to possession of the land, and imported a right to receive them under some agreement with the plaintiff who had the legal reversion; and, evidence of the agreement being given, the result is the same already discussed, namely, that the plaintiff held the land to the use of himself and the defendant, unless and until he elected to hold it in severalty, from which event he held it to his own use. The retention of the deed by the defendant materially aids the effect of the receipt of the rents.

Assuming that the Statute of Frauds does not prevent the adjudication of such a trust, it would follow that the moneys paid by the defendant being paid as purchaser, he must have a lien for them upon the land. It is only just that he should have such a lien, and the Court would not be astute to find grounds for an application of the statute by which that lien would be defeated. But I do not understand the plaintiff to take such a position. He couples his prayer for relief with an offer to repay the advances with interest, and I think the judgment to which he is entitled is a declaration of his title in severalty to the farm, subject to the defendant's lien. The judgment should be of the nature of a judgment in an action for redemption, with similar directions as to accounts and payment by the plaintiff of the amount due; and in case of default in payment, inasmuch as dismissing the action would not do complete justice to the defendant while the legal estate remains in the plaintiff, there should be a sale of the land as in an action to enforce a vendor's lien.

The appeal should be allowed, with costs.

BURTON, J. A.—The facts and evidence have been so fully discussed in the judgment of my brother Patterson that it is unnecessary for me again to refer to them.

The defendant in his amended statement of defence sets up "that at the time the conveyance was taken to the plaintiff there was an express agreement that he would, when the defendant desired it, execute a proper conveyance of an undivided half of the land to the defendant, and that he subsequently refused to do so, claiming the land as his own."

The plaintiff denies this agreement, and as such an agreement if it existed in fact could only be proved by a writing, a very large portion of the evidence was not properly receivable, and its appearance upon the appeal books is somewhat embarrassing as we are unable to ascertain how far it was acted upon by the learned Judge who permitted its reception, and I should infer from the reasons stated in the short judgment pronounced that the decision arrived at was based upon that alleged agreement, as it finds that the land was purchased on joint account, and that the plaintiff and defendant were entitled to it in equal moieties. The very form of the judgment would seem to negative the idea that the conclusion was arrived at on the basis of a trust resulting by operation of law from the payment of part of the purchase money, as it is clear that the payments were not made in equal moieties.

But for reasons which I shall presently state it appears to me to be impossible for the defendant to assert a resulting trust.

It is familiar law, not requiring a reference to authorities, that a trust will result in favor of the person who pays the whole, or a part of the purchase money, when the title is taken to another; but it is subject to this qualification that in the latter case the trust must result from payment of an aliquot portion of the purchase money, and be of an aliquot part of the whole interest in the property.

The cestui que trust to whom the trust results must become by operation of law a tenant in common with the grantee of some aliquot part of the whole, and the older cases which appear to decide that there can be no resulting trust in favor of one who advances only a portion of the

purchase money must be understood in that sense. So far back as *Wray v. Steele*, 2 V. & B. 338 the doctrine was clearly established that a trust may result, where the cestui que trust advanced only a portion of the purchase money, but in that and in all other cases that can be found on the subject, the trust was of an aliquot part of the estate, there one-third to the party who had advanced one-third of the purchase money.

Lord Eldon points out that the case of *Crop v. Norton*, 2 Atk. 74, was misconceived when it was cited as authority for the rule that a trust could not result from the payment of part of the purchase money. But he held that the principle was that the whole consideration for the whole estate or for the moiety, or third, or some definite part of the whole must be paid to be the foundation of a resulting trust; and that the contribution or payment of a sum of money, generally, for the estate, where such payment does not constitute the whole consideration, does not raise a trust by operation of law for him who pays it.

It seems also to be well established and follows as a necessary consequence from the principles governing this description of trust that it must arise, if at all, at the time of the conveyance, and that the money or other consideration for the deed must then be paid or secured to be paid.

The trust then which results to the purchaser by operation of law must be a pure unmixed trust of the ownership and title of the land or estate itself, and not an interest in the proceeds of the land, nor a lien upon it as a security for an advance, nor an equity or right to a sum of money to be raised out of the land or on the security of it.

These rights are the subjects of contracts or agreements of the parties, and may form the substance of express trusts, but they require that the title and legal estate of the lands out of which they arise should be not nominally but potentially in the trustee.

Mr. Perry, in his work upon Trusts, states the law upon this point in this way. The trust must result, if at all, at the instant the deed is taken, and the legal title vests in the

grantee. No oral agreements and no payments before or after the title is taken will create a resulting trust unless the transaction is such at the moment the title passes.

No doubt if the money had been paid at the time it would have been competent to shew by parol evidence that the money belonged wholly to one or was advanced by both in equal moieties, and it would not be converted into an express trust or be any the less a resulting trust because of the parol agreement. But as I understand the cases it would not aid the defendant to shew that he made the payments subsequently in terms of the antecedent prior parol agreement.

I am not prepared to say if the vendor had accepted from these two parties their separate notes for their several shares of the purchase money, the same result would not have followed as if the payments had then and there been made in money; on the contrary, I take it to be clear that it would. But I fail to see how the actual dealing here could have the effect of raising a resulting trust.

There was a partial payment of money raised on the joint note of the parties, and if that had been of the whole purchase money no question could have arisen; the money, though borrowed, would have been borrowed on the joint credit to enable each to pay his moiety of the purchase money, and so applied. But how the delivery of joint notes to the vendor for the balance of the purchase money can have any such effect I confess myself at a loss to discover.

If the plaintiff had been compelled to pay the whole of these notes without any assistance from McKercher would any trust have arisen in favor of the latter? If not, the mere circumstance that they did in point of fact—if it had been a fact—pay the notes in equal moieties could not create it.

But there is a further difficulty if the purchase is looked at, as I think it must be looked at, not as a purchase of the equity of redemption, but a purchase of the farm for \$3,600 the mortgage money being taken into account as

part of the purchase money. That mortgage is still outstanding, the defendant is under no obligation to pay it; if paid by the plaintiff he would have paid much more than one moiety of the purchase money.

It seems to me that upon the actual facts of this case the doctrine of resulting trusts can have no application. In *Rogers v. Murray*, 3 Page 390, Chancellor Walworth in speaking of such a trust refers to the law in very much the same terms as I have alluded to it, he says: "After the legal title has once passed to the grantee by deed it is impossible to raise a resulting trust so as to divest that legal estate by the subsequent application of funds in satisfaction of unpaid purchase money. The resulting trust must arise if at all at the time of the execution of the conveyance."

But the evidence in any view of it does not in my opinion warrant a judgment putting the defendants interest as a half interest in the land.

The total purchase was \$3,600, but the sum payable to the vendor over and above the incumbrance was \$2,300, the total payments made by the defendant amount to \$1,376, but of this \$450 was derived from rents, leaving his actual payments at \$926, which included other matters beyond payments on account of purchase money, whilst as I have pointed out the mortgage is still unpaid. Whatever therefore may be his rights I cannot see how the payments shew anything in the nature of a resulting trust in any aliquot portion of the land.

Assuming however there was no difficulty such as is presented here of shewing the express agreement, and assuming that the terms of the agreement as sworn to by the defendant himself had been reduced to writing, I do not see how the judgment can be sustained.

The deed was taken in the plaintiff's name by the defendant himself without any suggestion to that effect by the plaintiff, who alleges that he was induced to go into the purchase by the persuasion of the defendant who deprecated the dividing of the homestead into three parts, because he

said such a division would spoil the homestead, and that he informed the appellant that although he was building a house he would help him all he could.

Now what does the respondent say? "I will go in with you for it and put your name down in the writings, and if you want it when you are making a division of your homestead property you can have it."

This seems entirely inconsistent with the idea of its being absolutely and unconditionally a joint purchase such as the defendant now contends for.

If it were a joint purchase what became of the right which the defendant admits the plaintiff was to have of taking this land upon the division of the homestead which was contemplated. Would it not be rather a *reductio ad absurdum* to say he should have the right if he was willing to pay whatever the defendant chose to ask?

My reading of the evidence is that the defendant, a friend of the deceased Sanderson and a friend of the family, being also interested in the division of the homestead, inasmuch as one of the Sandersons was married to his daughter, and being satisfied that the land was ample security for any money he was willing to put into it, was willing to make advances and assume the risk of having to take the property as a joint adventure, but giving to the plaintiff the option of taking it if he thought proper in a certain event, that option excluding the idea that he had to treat with the defendant or his heirs for the purchase of an interest or to submit to a partition.

That may or may not be the true version of the transaction. I merely refer to it to shew the importance of adhering to the rule of law which requires such agreements to be evidenced by a writing. And upon the other branch of the case, how short the evidence falls of shewing conclusively, as the defendant attacking a sealed instrument prepared under his own instructions is bound to do, that his payments were made by him as purchaser as part of the purchase money.

The prominent idea in the minds of both parties when the purchase was made was by means of that purchase to avoid the necessity of dividing the farm into parcels too small for profitable enjoyment, and tends to negative the present contention that it was intended as a joint purchase.

This is strongly confirmed by the evidence of Gibson, the vendor, who is presumably a disinterested witness and who swears that the sale was to the plaintiff, and that the defendant was only to help him through and see that the notes and money were paid to him ; in addition to which there is the evidence of John Bell, the tenant of the farm, and Andrew Ireland, of distinct admissions by the defendant that it was a purchase by the plaintiff, and the sworn statement of the plaintiff.

This is as it seems to me not such clear evidence as is required in cases of this nature, or to use the language of the late Chancellor Spragge in *Hutchinson v. Hutchinson*, 6 Gr. 117: "It is not convincing, as on a bill filed to establish a contract differing from that evidenced by writing it must always be where any different contract can be shewn at all."

There is nothing in the contention mentioned in the reasons of appeal, but not much insisted, on upon the argument, that the appellant is now endeavouring to commit a fraud by setting up the Statute of Frauds, and therefore the Statute is no answer; if the contention were to prevail, there is no case in which the Statute could be set up. The Court, it is true, will not allow the Statute to be made an instrument of fraud, but in every case in which the Court has so held there has been some act or representation either operating by way of estoppel or a deliberate intent to defraud. Here the plaintiff is merely insisting on his legal right of requiring the alleged agreement to be proved by legal evidence.

For these reasons I am unable to agree with the learned Judge's conclusions, and think the appeal should be allowed, with costs.

The plaintiff can only be entitled to the relief he asks upon paying the amount due to the defendant for the sums advanced, and interest, but as I read the plaintiff's complaint and the submission contained in it, and in the prayer, we may I think fairly look upon it either as an admission that the conveyance was left with his consent in the hands of the defendant as a deposit in security for those advances, or that it shall be so treated; and I understood the plaintiff's counsel to make a similar submission at the hearing; so considered the defendant would have a lien for the amount, and the plaintiff would be entitled to redeem only on the usual terms. I agree therefore in the conclusion of my brother Patterson, though not precisely for the same reasons.

OSLER, J.A.—The Statute of Frauds, which is pleaded, prevents the defendant from recovering upon the footing of an express trust or an express parol agreement such as is set up in the counter-claim, and it is conceded that the only ground on which he can succeed is that of a resulting trust arising out of payment of part of the purchase money. The question therefore is whether the facts admit of such a trust being raised consistently with the authorities, of which, in addition to those which have been cited, I shall refer only to *Pomeroy* on Eq. Jur., sec. 1037, 1038; *Hill* on Trustees, ed. 1867, p. 157; *Perry* on Trusts, secs. 126, 133; *Story's* Eq. 13 ed., sec. 1201; *Olcott v. Bynum*, 17 Wallace 44-59; *Lounsbury v. Purdy*, 16 Barb. 376, affirmed 18 N. Y. 515; *Boyd v. McLean*, 1 Johns. Ch. Cas. 582; *Botsford v. Burr*, 2 ib. 404; *Steere v. Steere*, 5 ib. 1; *McGowan v. McGowan*, 14 Gray, 119; *Cutler v. Tuttle*, 19 N. J. Eq. 532; *Rogers v. Murray*, 3 Paige 390-399; *Dow v. Jewell*, 1 Foster N. H. 470.

The case put forward is the simple one of the conveyance of the legal estate to one person, another having paid part of the price. The plaintiff does not deny that a part was in fact advanced by the defendant but contends that it was not advanced qua purchaser but really as a loan, and

that any presumption of a resulting trust is negatived by the circumstances.

A careful examination of the evidence leads me, with great deference to the Chief Justice and my brother Armour, to the conclusion that this contention is well founded, and on this ground I concur in allowing the appeal.

HAGARTY, C. J. O.—The learned Judge in the Court below says: "The conclusion I have arrived at upon the hearing was that the plaintiff and defendant had purchased the land in question upon joint account, and a subsequent careful perusal of the evidence has rather strengthened that conclusion. The payment of the purchase money, the mode of payment and the proportions in which it was paid, the conduct of the parties as to it, and as to the rent of it, strongly corroborated the defendant's contention, and were, to my mind, capable of but one interpretation."

I have examined and considered the evidence with some care, and I am unable to discover any satisfactory reason for differing from the views on the questions of fact which he, with the great advantages of seeing all the parties under examination, has thus expressed.

I think we must hold it proved that the land was so purchased, and that the payments were made by the two parties as both contributing their respective shares of the amount.

It was of course open to the plaintiff to establish if he could that all the liabilities incurred, and all the moneys advanced by defendant, were simply by way of loan to him to help him to buy the land, and that the large liability incurred by him on the notes, &c., was wholly as his surety to satisfy the vendor. I find it impossible to accept that view of the evidence. No security was apparently ever asked by or offered to defendant, not even an acknowledgment or receipt for his advances.

I think it most likely that defendant interested himself in this matter with the ultimate design of assisting his

son-in-law Matthew to be in a better position when the division of the Sanderson estate came to be made.

The evidence of Gibson, the vendor, was much relied on by plaintiff, shewing his idea that he sold only to plaintiff, and that defendant was merely to help him through. His evidence was unfortunately taken on commission. It appears from it that plaintiff and defendant first came together to him about the place. His evidence about the defendant giving or selling to him the two heifers, one credited as so much cash paid on the day of the bargain, the other to go on the first note, seems very singular if defendant was simply a friend helping plaintiff as a surety. At the same time four notes signed by the plaintiff and defendant as makers were given to make up \$1,500 of purchase money.

The evidence of Gibson is much weakened, if not neutralised, by that of Wilson, who was acting for him in forwarding the sale. Wilson says, before deeds signed, that Gibson told him defendant had bought the place, and that he thought plaintiff "was in with him."

Wilson's evidence in other particulars, I think, much assists the defendant. I do not place much reliance on the remarks sworn to by casual witnesses, having no particular interest in the matter. The evidence of defendant's sons and plaintiff's brother Matthew supports defendant's contention.

I repeat my conviction that it is next to impossible to believe that the undisputed facts in evidence as to the conduct of the parties in the making of these payments, the providing the money and meeting the notes as they fell due, &c., consist with plaintiff's contention that defendant was simply assisting him as an ordinary lender of money or surety in these protracted dealings.

It is impossible, also, in judging the truth of plaintiff's contention, that these advances to plaintiff were to "help him through," as he calls it, to overlook the care apparently taken all through, that each party should pay half of the required amounts, and the scrutiny of the

accounts to ascertain whether one was or was not in advance of the other in payments.

The case made by the plaintiff in his bill is based on an alleged advance of money by defendant to aid him in the purchase, and he wholly denies any bargain or contract between them by which defendant acquired any interest.

Defendant insists that they purchased on joint account. He states that he first proposed to plaintiff that he (plaintiff) and his brother would go into the purchase as a good investment or speculation, or if they and defendant and his two sons did so it would be a good speculation. The brother and the sons declined, and defendant then agreed with plaintiff to purchase, and said that when the Sanderson homestead was divided the plaintiff could have the whole of it, paying defendant half the value of the property.

Alexander McKercher, defendant's son, in my judgment, strongly supports the view that the place was bought on speculation. He stated conversations with plaintiff just before the actual purchase, who said it was a good chance, and that it would sell for more than they would pay for it. Plaintiff seemed anxious to buy, and witness said: "If you think you can make money out of it go ahead." After the purchase plaintiff told him that nobody would get a deed for less than \$1,000 on the bargain. And apparently after or during the dispute plaintiff said to him that if the place came down in value he would have to make it up.

The ultimate quarrel, resulting in this suit, was their inability to agree on value, defendant wanting more than plaintiff was willing to give for his half, and plaintiff refusing to sell at what defendant offered.

Matthew Sanderson swore that the day before the purchase the plaintiff told him that one of the McKercher boys said they did not care to go into the place for themselves, but they were going into it for speculation. The plaintiff, while strongly denying that defendant had or ever claimed to have any interest till after the dispute, says

that the McKercher boys told him they were willing for their father to buy it upon speculation. That McKercher said: "They did not want any more land; that if it was a speculation it was all right. I told him what his father had said, and then he said if you want it it is all right." What the father said, as the plaintiff states it, was that he asked plaintiff that he and his brother Matthew should buy the place and he would help.

I do not propose to point out the many points in the evidence or to attempt any extended analysis of it.

I am satisfied with the conclusion of fact in the judgment appealed from.

The purchase money was paid from time to time on the basis of each party as far as practicable furnishing half the amount.

As to the law of the case, I do not think that the Statute of Frauds is in defendant's way. The law is very fully stated in the notes to *Dyer v. Dyer*, 1 W. & T., L. C., especially at p. 248, ed. of 1886; Lewin 164, ed. 1885. The distinction is well pointed out in the well known case of *Bartlett v. Pickersgill*, 1 Eden. 515, as to the trust, which is exempted from the operation of the statute, which arises from the payment of the money, not from the agreement of the parties.

The doubt said to be thrown on this case in *Heard v. Pilley*, L. R. 4 Ch. 552, does not touch the point before us so as to favor the plaintiff: *Dart V. & P.* 931.

Mr. Justice Strong in several cases in our Court of Chancery very fully explains this branch of the law. See *Williams v. Jenkins*, 18 Gr. 538, also in the well considered case of *Wilde v. Wilde*, 20 Gr. 532.

The case before us is free from any difficulty of proof as to the purchase money advanced by defendant, the only question being quo intuitu, it was so advanced. *Wray v. Steele and Picker*, 2 V. & B. 388, is a case referred to in all the text books.

V. C. Sir Thomas Plumer decided there was a resulting trust and joint advance where the purchase was taken in

the name of one. Lord Hardwicke was supposed to have thought that it was confined to cases where the whole consideration moved from one person. "Lord Hardwicke," says the V. C., "could not have used the language ascribed to him. What is there applicable to an advance by a single individual that is not equally applicable to a joint advance under similar circumstances?" On these grounds I think the defendant Picker is entitled, if the fact of his having advanced part of the purchase money can be made out, and as to that there must be an inquiry."

The subject is very fully treated in a recent work, Reed on the Statute of Frauds, (1884), sec. 920 and 923, where this last case, with a very large number of American authorities, is cited.

The evidence, as I understand it, points strongly to the conclusion that it was an ordinary purchase on joint account, and that there was no agreement or undertaking on defendant's part to give it to plaintiff on payment of his (defendant's) share of the purchase money, on any contingency. If we hold that there was such latter agreement it is against the plaintiff's contention, and as I think wholly unsupported in evidence. No witness suggests it, and I do not feel warranted in importing it into the case. The very character for shrewdness and worldly wisdom which plaintiff ascribes to defendant seems to me against the idea that he made or intended any such bargain. It is quite possible that he went into the purchase with the view of ultimately obtaining for his son-in-law Matthew a better share in the division of the homestead, and that his joint interest in this Gibson farm would enable him to carry out such view.

A difficulty was suggested as to the only partial payment of defendant's share of the money at the time of purchase.

There is not much authority that I have seen on this point.

Two instructive judgments of Chancellor Kent may be referred to, *Boyd v. McLean*, 1 Johns. C. 582; *Botsford v. Burr*, 2 ib. 408. "The trust arises (he says) out of the

circumstance that the moneys of the real and not of the nominal purchaser formed *at the time* the consideration of purchase and became converted into the land, nor would a subsequent advance of money to the purchaser after the purchase is thus complete and ended alter the case. It might be evidence of a new loan, but it would not attach by relation a trust to the original purchase." In reference to a note given months after the purchase to the purchaser the learned Chancellor says, "The note affords no ground for a resulting trust * * because such a trust arises only from the payment *originally* of the purchase money or at least a part of it by the party setting up the trust."

I am not prepared to see any difficulty in the fact that all the purchase money was not paid at the time of purchase. It is undoubtedly clear that subsequent payments by the person claiming the resulting trust in his favor must shew such payments to have been made on or as part of the original purchase; that the trust must arise in the origin of the transaction. This is clearly pointed out in Chancellor Kent's judgment. If the person claiming the interest prove that he and the nominal vendee each paid down so much in money and then gave notes or securities for the residue on equal terms, it was hardly disputed but that would satisfy the law.

As I said before, there is apparently no direct decision, but I gather from the course of judicial remark in several of the cases that such an objection should not prevail.

In both the cases cited of *Williams v. Jenkins* and *Wilde v. Wilde*, as I read them, they seem to treat the subsequent payment, if all part of the consideration under the original understanding, as sufficient. In the first case the consideration, viz., the crushing and testing of the ore, would seem to have been done after the purchase.

In *Wilde v. Wilde* the alleged payment of part at least of the consideration was after the purchase.

In *Wray v. Steele*, 2 V. & B. 388, the facts are very meagrely reported, but as I understand them there was only a part paid at the time.

Mr. Justice Strong says in *Wilde v. Wilde*, p. 536 : "There can be no doubt but that a trust results where two or more persons in determined proportions advance the purchase money of land which is conveyed to one as was decided in *Wray v. Steele*. Where, however, it is impossible to determine the proportions in which there has been contribution to price, as here, it is impossible there can be any trust by operation of law, for the court cannot determine the interest."

I also refer to Sir. Wm. Grant's remarks in *Aveling v. Knipe*, 19 Ves. 444, although the point for decision was mainly whether there was a joint tenancy.

See also some remarks of the Vice-Chancellor in *Hill v. Hill*, 8 Irish Eq. R. at p. 144-5.

On the whole case I think the decision below was right on the facts, and there is nothing in law to prevent its being upheld.

Appeal allowed, with costs ; HAGARTY, C.J.O., dissenting.

ORDER.—It was ordered and adjudged by the said Court that the said appeal should be and the same was allowed, with the sum of three hundred and fifty-eight dollars and seventy cents (\$358.70), costs incurred in respect of said appeal, to be paid by the respondent to the appellant, and that the aforesaid judgment of the said Divisional Court be and the same is hereby reversed ; (2) And the said Court did declare that the appellant is solely entitled to the lands and premises in question in this action free from any claim of the respondent other than a lien thereon for any moneys expended by him in effecting the purchase of such lands and premises for which the respondent was declared to be entitled to have a lien thereon ; (3) And this Court did further order and adjudge that it should be referred to the Master of the Supreme Court of Judicature for Ontario at Goderich to take an account of the several amounts, if any, advanced and paid by the respondent for or on account of the appellant in the purchase of the said lands and premises, and to tax the costs of the reference hereinafter directed ; (4) And this Court did further order and adjudge that upon payment of such amount as shall be found due by the appellant to the respondent for principal, interest and costs, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, or in case nothing shall be found due to the respondent, then forthwith after the confirmation of the said

Master's report, that the respondent do deliver to the appellant the conveyances of the said land from the vendor, Thomas W. Gibson, in the pleadings named, and all other title deeds and muniments of title in his possession or power relating thereto, and do execute a good and sufficient release of his said lien, such release to be settled by the said Master in case the parties differ ; (5) And this Court did further order and adjudge that in case of default in payment as aforesaid the said lands be sold with the approbation of the said Master, who is to settle the conveyances to the purchaser or purchasers thereof, who are to pay his, her, or their purchase money into Court to the credit of the action, and the same when so paid in is to be paid out and applied in payment of the amount found due in respect of the said lien, with subsequent interest and subsequent costs, to be computed and taxed by the said Master, and the balance, if any, is to be paid out to the appellant.

GRAY V. DUNDAS.

Municipal corporations—Sewage—Riparian proprietor—Fouling stream.

THE judgment of the C. P. D., reported 11 O. R. 317, was unanimously affirmed by this Court and the appeal therefrom dismissed, with costs. [22 March, 1887.]

Lount, Q.C., for the appellant.

Osler, Q.C., for the respondents.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
THE COURT OF APPEAL,
CONTAINED IN THIS VOLUME.

ABSOLUTE ASSIGNMENT.

See POWER OF SALE.

**ACCEPTANCE OF PART OF
GOODS PURCHASED.**

See SALE AND PURCHASE.

ACCORD AND SATISFACTION.

See VAGUE AGREEMENT.

ACTION FOR GOODS SOLD.

[AND DELIVERED ON FAILURE TO PAY
AS AGREED ON, EITHER BY CASH
OR NOTE.]

See SALE OF GOODS.

ACTION,

[MANDAMUS OR PROCEEDINGS BY.]

See BONUS TO RAILWAY COMPANY.
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ADMISSIBILITY OF PAROL EVIDENCE TO REFORM WRITING.

See WRITTEN LEASE.

**AGREEMENT TO SURRENDER
LEASE.**

The plaintiff was lessee of certain premises, the lease having nearly a year to run, when he was on or about the 13th of January applied to on behalf of the defendant, the executor of the lessor, to surrender the remainder of his term, which he consented to do in consideration of \$250, agreeing to give up possession on the 1st of February. In consequence of negotiations between the parties interested, the plaintiff did not actually give up possession until the end of February, he agreeing to deduct a month's rent as reserved in the lease. Possession was accepted by the defendant's agent, but the defendant refused to pay the consideration agreed upon, alleging as a principal ground for such refusal the

non-delivery of possession on the day named.

Held, that time was not by the agreement made of the essence of the contract, and the delay formed no defence to an action for the sum agreed to be paid. *Dainty v. Vidal*, 47.

APPEAL.

See CANADA TEMPERANCE ACT.

ARBITRATION, [REFERENCE TO.]

See INDICTMENT.

ARBITRATOR.

See ARCHITECT.

ARCHITECT.

Although an architect, employed by the owner, for reward to superintend the construction of a house may, as between the latter and the contractor by the terms of their own agreement be in the position of an arbitrator and his decision as between them unimpeachable except for fraud or dishonesty, yet as between himself and his employer he is answerable for either negligence or unskilfulness in the performance of his duty as architect.

Irving v. Morrison, 27 C. P. 242, approved. *Badgley v. Dickson*, 494.

ASSESSMENT, [REFUNDING EXCESS OF.]

See MUNICIPAL CORPORATIONS.

ASSIGNMENT BY INCORPORATED COMPANY.

See CHATTEL MORTGAGE.

BAGGAGE, [LIABILITY FOR LOSS OF.]

See RAILWAY COMPANY.

BAILEES.

See RAILWAY COMPANY.

BENEFICIARY, DEATH OF.

[IN LIFE TIME OF PARTY INSURED.]

See LIFE INSURANCE, &c.

BILLS OF SALE ACT.

See CHATTEL MORTGAGE.

BONUS TO A RAILWAY COMPANY.

The plaintiffs had obtained an order absolute in the Queen's Bench Division for a mandamus for the delivery to the plaintiffs by the defendant municipality of municipal debentures to the amount of \$75,000, being a bonus to the undertaking of the plaintiffs voted to them by the municipality, together with interest thereon from November, 1870. On appeal to this Court this judgment was reversed on grounds equally adverse to any right to proceed by action as to claim by mandamus. The Supreme Court of Canada affirmed that judgment, holding that action and not mandamus was the

proper remedy, if any existed, at the same time expressing an opinion that the by-law was invalid. Subsequently the plaintiffs instituted proceedings in the Queen's Bench Division to enforce delivery of the debentures or payment of the amount. At a trial before a Judge without a jury the action was dismissed. On appeal this Court, without exercising any independent judgment in the matter, acted on the views expressed in its former judgment and by the Supreme Court and dismissed the appeal. *Grand Junction R. W. Co. v. The County of Peterborough*, 420.

BRITISH NORTH AMERICA ACT.

See INDIAN LANDS.

BROKERS, USAGE OF.

See USAGE, &c.

BUILDING, OWNER, AND CONTRACTOR.

See ARCHITECT.

BY-LAW OPENING STREET.

See ORDER AMENDING PLAN, &c.

BY-LAW, VOTING ON.

See BONUS TO RAILWAY COMPANY.

CANADA TEMPERANCE ACT.

The defendant who was convicted by two justices under the Canada Temperance Act removed the conviction by certiorari, and the same was quashed. On appeal to this Court :

Held, that there was no jurisdiction in this Court to hear the appeal, and the same was therefore quashed, with costs to be paid by the informant. *Regina v. Eli*, 526.

CASES.

Allan v. McTavish, 2 A. R. 279, commented on.—*See* EXECUTION.

Boice v. O'Loane, 3 A. R. 167, commented on.—*See* EXECUTION.

Burrill v. Marlborough, 27 U. C. R. 119, affirmed.—*See* ROAD ALLOWANCES.

Cameron v. Wait, 3 A. R. 175, explained.—*See* ROAD ALLOWANCES.

Donly v. Holmwood, 4 A. R. 555, distinguished.—*See* CHATTEL MORTGAGE.

Hicks v. The Newport &c. R. W. Co., 4 B. & S. 403, in note, commented on.—*See* LIFE POLICY.

Irving v. Morrison, 27 C. P. 242, approved.—*See* BUILDING OWNER AND CONTRACTOR.

Kough v. Price, 27 C. P. 309, commented on.—*See* CHATTEL MORTGAGE.

McCall v. Woolf, S. C. Can., not reported followed.—*See* CHATTEL MORTGAGE.

Nolan v. Donnelly, 4 O. R. 440, observed upon.—*See* CHATTEL MORTGAGE.

Ontario Bank v. Wilcox, 42 U. C. R., commented on.—*See* CHATTEL MORTGAGE.

Parkes v. St. George, 10 A. R. 496, followed.—See CHATTEL MORTGAGE.

Robertson v. Thomas, 8 O. R. 20, overruled.—See CHATTEL MORTGAGE.

Scribner v. Kinloch, 12 A. R. 367, followed.—See CHATTEL MORTGAGE.

CHANGE OF POSSESSION.

See CHATTEL MORTGAGE.

CHATTEL MORTGAGE.

1. An incorporated trading company being in insolvent circumstances, the president and secretary on the 15th August, 1884, in pursuance of a resolution of the board of directors joined in executing to the plaintiffs—one of whom was president of the company—as trustees for creditors, an assignment of all the real and personal estate of the company, stock in trade, &c., “and all other, the personal estate and effects whatsoever and wheresoever, and whether upon the premises where the company’s business is now carried on or elsewhere which the company is possessed of or entitled to in any way whatsoever,” which assignment was duly filed on the following day, and the business was continued as before until the 23rd of the same month, when letters were written by the secretary in which the trustees were mentioned, and five days later Whiting, one of the trustees, demanded and received from the manager of the company the keys of the post office box, and directed the manager to keep the concern running. On

the 4th of October the first of several executions against the goods of the company was sued out and placed in the sheriff’s hands.

Held (1), That assignments for the benefit of creditors were, until 48 Vict. ch. 8 (O), within the Act relating to chattel mortgages and bills of sale; R. S. O. ch. 119.

Robertson v. Thomas, 8 O. R. 20, overruled.

Held (2), That although the description of the property intended to be assigned in this case was not sufficient within the Act; yet that under the circumstances there had been such an actual and continued change of possession as to defeat the executions against the company.

Parkes v. St. George, 10 A. R. 496, and *Scribner v. Kinloch*, 12 A. R. 367, followed.

¶ *Semble*, A description of property in a bill of sale or chattel mortgage as “the stock in trade” of the grantor in a specified locality, such as his store or warehouse in such a place or street is sufficient.

Nolan v. Donnelly, 4 O. R. 440, observed upon.

McCall v. Woolf, Sup. Ct. Can. [not yet reported] followed.

Held (3), [BURTON, J. A., dissenting], that the directors of an incorporated trading company had power to authorize the execution of an assignment for the benefit of creditors of the company, and that the defendants, execution creditors, as strangers to the company could not object that the authority of the shareholders was not given or that they had not ratified the deed.

¶ *Donly v. Holmwood*, 4 A. R. 555, distinguished.

Per BURTON, J. A., that the directors could not do so without the sanction of the shareholders.

The judgment of the Court below reversed, BURTON, J. A., dissenting. *Whiting et al. v. Hovey et al.*, 7.

[Affirmed in Supreme Court 14 March, 1887.]

2. It is essential to the validity of a chattel mortgage to secure the mortgagee against the indorsement of any bill or note, &c., under sec. 6 of R. S. O. ch. 119, that it should set forth fully the agreement between the parties and the amount of the liability intended to be created, and that the liability which it professes to secure, should be truly stated.

In November, 1881, the plaintiff indorsed a promissory note for the accommodation of M. for \$550 at three months, and as indemnity against any liability in respect thereof, or of any renewal, took from M. a chattel mortgage which was only renewed once, although the note remained unpaid until the 4th of November, 1882, when \$50 was paid by M. on account, and a new note at six months was given for \$500 in which the plaintiff joined as maker instead of as indorser, and after this note became due and had remained unpaid for six months the plaintiff obtained a second mortgage from M., reciting that he had indorsed a note for \$550, which had not been paid, and that plaintiff was still liable thereon, or on the renewal thereof, and was liable to be called upon at any time to pay the amount, and the plaintiff was called upon to pay and actually did pay the note and interest amounting to about \$590.

In an interpleader proceeding at the instance of an execution creditor of M.

Held, [affirming the judgment of the County Court] that the mortgage was void as against such creditor.

The distinction between mortgages under the 1st and under the 6th section of the Act, considered and acted on.

The distinction between the two classes of cases provided for by the 6th section, considered.

Kough v. Price, 27 C. P. 309 ; *Ontario Bank v. Wilcox*, 42 U. C. R. 329, commented on. *Barber v. Macpherson*, 356.

See also FIXTURES.

CLAIMS FOR DAMAGES BETWEEN PARTIES.]

See WINDING-UP ACT.

COLLATERAL EVIDENCE.]

See SPECIFIC PERFORMANCE.

COLLATERAL SECURITY

See MORTGAGE.

COMMON CARRIERS.

See RAILWAY COMPANY.

COMPENSATION.

See ROAD ALLOWANCES.

CONSIDERATION INCORRECTLY STATED.

[IN CHATTEL MORTGAGE.]

See CHATTEL MORTGAGE, 2.

DIVISION COURTS' AMENDMENT ACT.

See INTERPLEADER.

DOWER, [RIGHT TO, BARRED.]

The owner of land died intestate in 1858, leaving his widow and two infant daughters in possession, all of whom continued to occupy and cultivate the farm until 1883, when the daughters left the premises. In February, 1884, the widow intermarried with J. M. No proceeding had meanwhile been taken or claim made by the widow to have dower assigned to her. In an action brought by the daughters against J. M. and his wife, to recover possession the mother claimed she was entitled to retain possession of the premises in respect of her dower, but

Held, that the right to dower was barred by 38 Vict. ch. 16, s. 14, (O.), which requires proceedings to be taken to enforce a widow's dower within ten years from the death of her husband. *McDonald v. McRae*, 121.

EVIDENCE.

See WRITTEN CONTRACT—WRITTEN LEASE.

EXECUTORS, [POWER OF, TO SELL LANDS OF HEIR.]

See WILL, &c.

EXPRESS COMPANY, [FACILITIES TO.]

See RAILWAY COMPANY, 3.

EXEMPTION FROM TAXATION.

See MUNICIPAL COUNCIL.

EXECUTION.

The plaintiff recovered judgment against the defendants on the 3rd of November, 1863, and the last execution issued thereon was returned in September, 1865.

More than twenty years afterwards the plaintiff moved for leave to issue execution against the surviving defendant, but no evidence was given of any part payment on account of the judgment or acknowledgment of liability thereon within that period.

Held, that if the motion was necessary it had been rightly refused.

Quære, whether it was necessary to obtain leave to issue execution upon or to revive the judgment, execution having been in fact issued and returned within six years from its recovery.

Allan v. McTavish, 2 A. R. 278; *Boice v. O'Loane*, 3 A. R. 167, commented on. *McMahon v. Spencer*, 430.

—, SUBSEQUENT.

See CREDITORS' RELIEF ACT.

EQUITY OF REDEMPTION.

See MORTGAGE.

FIXTURES.

O. & K. under a verbal agreement with an agent of the Canada Company (which that company refused to adopt) entered into possession of land belonging to the latter, and erected a steam mill thereon. They procured from the plaintiffs an engine, boiler, &c., under an agreement

that the property therein should not pass to the vendees till paid for. They exchanged the plaintiffs' boiler for another made by one D., which they put up with the plaintiffs' engine. This coming to the knowledge of the plaintiffs they seized their own boiler, in consequence of which O. & K. on the 27th of November, 1883, executed to plaintiffs a chattel mortgage on the "D" boiler.

Prior to this date, however, and on the 12th of the same month O. & K. executed a mortgage on the said lands and premises to the defendant, to whom they were indebted, and three days later as a matter of precaution and as part of the same bargain they executed a chattel mortgage in his favor as further security for a debt due him (not naming any amount), and assigned all and singular certain goods, &c., viz: "One mill and machinery, one frame house * * two bay horses." &c., This security by reason of defects under the Chattel Mortgage Act was void as against the plaintiffs' claim. Prior to the commencement of this action the defendant obtained from the Canada Company a deed of the land in question. On appeal to this court it was

Held [in this reversing the judgment of the Court below], that although O. & K. had not any interest in the land on which they had so erected their mill, and placed their machinery, yet by their mortgage the "D." boiler and other fixtures not originally purchased from the plaintiffs, passed to the defendant, as part of the realty; such mortgage unlike that of the chattels not requiring registration to give it validity.

Held, also, that the defendant might support his title under the deed from the Canada Company;

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the boiler having been affixed to the land and passing under the deed as part of the realty.

Per PATTERSON, J. A.—No difficulty existed in supporting the defendant's title under either of his own mortgages, or under the conveyance from the Company. *Stevens v. Barfoot*, 366.

FOULING STREAM.

See MUNICIPAL CORPORATION 2.

FRAUDS, STATUTE OF.

See ROAD COMPANY.

GOODS, [SUFFICIENT DESCRIPTION OF.]

See CHATTEL MORTGAGE, 1.

LOCALITY OF.

See CHATTEL MORTGAGE, 1.

SALE AND PURCHASE OF.

See SALE AND PURCHASE.

GRANT FROM THE CROWN.

The judgment of the C. P. D., 6 O. R. 532 was affirmed, and an appeal therefrom dismissed, with costs, by the unanimous judgment of this Court. *Cain v. Junkin*, 525.

HIGH RATE OF SPEED.

See RAILWAY COMPANY, 2.

INCORPORATED COMPANY.

1. The plaintiffs were the owners of certain boats, docks, &c., and being desirous of giving up their business proposed to sell all their rights in their charter, boats, &c., to a company to be thereafter incorporated as the "Thames River Navigation Company." The proposal was assented to by the defendants and others subscribing to the stock of the new company, and the purchase money was to be paid out of the funds of the latter when formed. Upon this understanding the vessels were delivered to the defendants on behalf of all parties, and the sum of \$3,500 on account of such purchase was paid out of the money paid in by persons subscribing for shares in the new company. Before the completion of repairs necessary to render the boats serviceable, one of them was destroyed by an unexpected flood, in consequence of which, proceedings for the incorporation of the new company were abandoned.

Held, [reversing the judgment of the Court below] that the defendants were not liable for the balance of the purchase money, as the circumstances shewed there had never been a completed sale and purchase. The only contract proved, was a provisional one to take effect upon the incorporation of the new company, and the delivery which had taken place, was not in pursuance of a contract of sale, but simply to enable the repairs upon the vessels to be effected, *Thames Navigation Company (limited) v. Reid et al.*, 303.

2. *Held* [affirming the judgment of the C. P. D.] BURTON, J. A., dissenting, that the duty of the Provincial Secretary of Ontario in issuing the notice of the increase of the capital stock of an incorporated

company, required to be given under 27 and 28 Vict. ch. 23, sec. 5, sub-sec. 18, is merely ministerial; and that on the requirements of the Act being complied with he has not any discretion in the matter, but must issue the notice.

Held, also that the power conferred of increasing the capital stock by sub-secs. 16, 17, and 18 of sec. 5, is a general power not limited to a single occasion.

Held, lastly, that there is nothing in the Act which makes a prior subscription and payment of the new stock, or a part of it, a pre-requisite to the right of the company to have the notice published.

Per BURTON, J. A. The object with which the statute was passed was to avoid the necessity and expense of applying in each case to the Legislature for a charter, thus delegating the power to grant the same to the executive, under certain conditions; there was, therefore, conferred upon the executive the same right to control the increase of capital, as without such statute would have remained with the legislature.

And *Quære*, *per* BURTON, J. A. Whether under the Act there can be more than one increase of the capital. *In re The Massey Manufacturing Company.*

[After this case was carried to the Sup. Court a settlement was effected by Massey purchasing the interests of the dissentient shareholders.]

INDIAN LANDS.

Held, [affirming the judgment of BOYD, C.] that lands ungranted upon which Indians have been accustomed to roam and live in their primitive state, from part of the public lands, and are under the B. N. A. Act now held in the same manner by that

Province in which such lands are situate as before the Confederation of the several Provinces. *Regina v. The St. Catharines Milling and Lumber Company*, 148.

INCORPORATED COMPANY,
[ASSIGNMENT BY.]

See CHATTEL MORTGAGE, 1.

INCREASE OF CAPITAL.

See INCORPORATED COMPANY, 2.

INFANT SHAREHOLDER.

See ROAD COMPANY.

INDICTMENT.

An Indictment had been preferred against the defendant for obstructing a public road or right of way across certain lots; and after the trial thereof had proceeded sometime was unavoidably adjourned till another Court, before the sitting of which an agreement to refer the indictment and all matters in dispute to arbitration was entered into. In pursuance of such agreement evidence was taken before the arbitrators who made an award that the defendant should pay twenty-five cents damages to the municipality and and that each of the parties should pay his own costs of the criminal proceedings, and one half the costs of the arbitration, and if the whole of the latter costs were paid by one of them such party should be entitled to be repaid one half. The plaintiffs having paid the whole of

these costs sued the defendant for a moiety thereof:

Held [reversing the judgment of the County Court] that the submission having been entered into with the intention of abandoning, and for the express purpose of putting an end to the prosecution of the indictment, it was illegal and void, and could not be made the foundation of a binding award, and the action was dismissed, with costs; but under the circumstances the appellant was refused his costs of appeal. *The Corporation of the Township of Hungerford v. Latimer*, 315.

INSUFFICIENT STOCK SUBSCRIPTION.

See ROAD COMPANY.

INSURANCE MONEY,
[TO WHOM IT BELONGS.]

See LIFE INSURANCE, &c.

INTERPLEADER.

On an interpleader proceeding in the Division Court under 48 Vict. ch. 14, sec. 6, sub-sec. 3, (O.) in respect of a claim to goods taken in execution, any claims between the parties themselves for damages arising out of the execution of the process, must also be brought before and adjudicated upon by the Judge who hears the interpleader summons. Whether such claims are then brought forward or not the adjudication upon the summons is final and conclusive between the parties, and no action

can afterwards be maintained in respect of them.

In such an action the fact of the previous adjudication may be properly pleaded as a defence.

Quere, whether the proceedings therein can be summarily stayed on motion.

Quere, whether an appeal lies under ch. 14, sec. 7, sub-sec. 2, from the adjudication of the Judge of the Division Court on a claim for damages. *Fox v. Symington*, 296.

See also CHATTEL MORTGAGE.

INTEREST ON AMOUNT FOUND DUE [UNDER BOND].

See PRINCIPAL AND SURETY.

INTESTACY.

See WILL &c., 1.

INVALID AWARD.

See INDICTMENT.

INVALID BY-LAW.

See MUNICIPAL COUNCIL.

JUDGMENT OVER TWENTY YEARS OLD.

See EXECUTION.

JURISDICTION OF COUNTY COURT.

See COUNTY COURT—SALE OF GOODS &c.

JURISDICTION, WANT OF.

See CANADA TEMPERANCE ACT.

LAPSE OF TIME.

See DOWER, &c.

LANDLORD AND TENANT.

See EVIDENCE, 2.

LEASE OR LICENSE.

See CONSTRUCTION OF DEED.

LIABILITY FOR LOSS OF BAGGAGE.

See RAILWAY COMPANY 1.

LIABILITIES OF PARTNERS

[FOR MONEY LENT TO INDIVIDUAL MEMBER.]

See PRINCIPAL AND AGENT,

LIEN FOR MONEY ADVANCED.

The defendant, whose daughter had married a brother of the plaintiff and who was an executor named in the will of S., the father of the plaintiff, took a more than common interest in the settlement of his testator's estate. In consequence he suggested to the plaintiff the desirability of his purchasing the estate of one G. situated near the S. homestead as by so doing the plaintiff could retain the G. farm leaving the homestead to be equally divided between the two brothers; saying

in answer to plaintiff's objection of want of means that he, defendant, would assist him with his payments.

The purchase was accordingly effected and plaintiff and defendant paid up the purchase money, but not in any agreed proportions, some of defendant's advances being made partly in cash and partly in kind and the conveyance was made to the plaintiff, the defendant subscribing as the witness and retaining possession of the deed.

On an attempted settlement of their respective rights the defendant under the circumstances insisted that he and the plaintiff had purchased on joint account and that there was a resulting trust in his favor as to a moiety of the land and that he was entitled to the then value thereof and on proceedings taken by the plaintiff, ARMOUR, J. gave judgment in favor of the defendant's contention.

On appeal this Court *Held*, [HAGARTY, C. J. O., dissenting,] that on the evidence there was not a resulting trust; that all defendant could claim was a lien for the amount advanced by him; and a reference was directed to take the account and if the amount found due should not be paid in six months that the estate should be sold; the amount due defendant paid to him and the surplus, if any, paid to the plaintiff. *Sanderson v. McKercher*, 561.

[Since carried to the Supreme Court.]

LIFE INSURANCE FOR BENEFIT OF CHILD.

In 1868 M. effected a policy on his life for the benefit of his daughter who intermarried with the plaintiff, and predeceased her father, having bequeathed her interest in such

policy to the plaintiff (her executor) in trust for her only child. M.'s wife died, and in 1887, prior to the marriage of his daughter, he married the defendant. In 1884 M. died intestate, leaving the defendant, his widow and one child surviving, without making any other disposition of his life policy.

In an action instituted by the plaintiff against the defendant, the widow and administratrix of M., it was

Held, [affirming the judgment of FERGUSON, J.,] that the insurance money formed part of the personal estate of M., and as such was payable to the defendant. *Wicksteed v. Munro*, 486.

LIFE POLICY.

See RAILWAY COMPANY, 2.

LIQUIDATED DAMAGES.

See COUNTY COURTS, &c.

LIQUIDATOR, ORDER APPOINTING.

See WINDING-UP ACT.

LOCALITY OF GOODS.

See CHATTEL MORTGAGE, 1.

MANDAMUS OR ACTION, PROCEEDING BY.

See BONUS TO RAILWAY COMPANY.
—INCORPORATED COMPANY, 2.

MARGIN, CARRYING STOCK ON.*See* USAGE OF BROKERS.**MARRIED WOMAN SHARE-HOLDER.***See* ROAD COMPANY.**MECHANIC'S LIEN.**

In an action to enforce a mechanic's lien under R. S. O. ch. 120. a reference in the usual form was directed to the local master at Chatham, to inquire whether any person besides the plaintiffs, other than prior mortgagees, had any incumbrance &c., upon the premises in question. In proceeding under this reference, the master made a number of persons including the appellants, parties in his office, and caused them to be served with notice "T," which erroneously recited the judgment as directing an inquiry as to incumbrances generally. The appellants thereupon petitioned to discharge the master's order upon the ground that they were prior mortgagees, and hence not necessary or proper parties to the action.

It appeared that the appellants registered their mortgage before any of the work was done or materials supplied for which the plaintiffs claimed, and had advanced the full amount of the mortgage money some months before the plaintiffs' lien was registered, though a portion was advanced after they had commenced work or supplied materials. The mortgagees had no notice of the plaintiffs' lien.

Held, reversing the judgment of the Court below, that the appellants' claim was prior to that of the plain-

tiffs, and that they were not proper parties to the action, being excepted by the terms of the judgment, nor was the master warranted in entering upon any inquiry as to the amount advanced by them subsequent to the commencement of the work.

Richards v. Chamberlain, 25 Gr. 402, and *Hynes v. Smith*, 27 Gr. 150, referred to *McVean v. Tiffin*. — 1.

MORTGAGE, &c.

The defendant M. had in his possession as executor of J. D. C., a mortgage of one R., which the agent of M. had deposited with H. as collateral security for moneys advanced to such agent, in all about \$400. Some years after M. executed an assignment of this mortgage to S. C. a legatee under the will for the alleged purpose of securing payment of her legacy; at the same time giving a personal covenant for the same object.

H. assuming to act as owner of such mortgage, wrote to the persons owning the equity of redemption, that he controlled the mortgage; that the lands were incumbered for more than their value, and suggested that they should convey their right to him. This they did for \$30, by conveying to a trustee for H., and subsequently H. in consideration of \$500, obtained from S. C. an assignment of her interest in the R. mortgage, and also an assignment of the covenant of M.

H. subsequently sold these lands for an alleged consideration of \$5000; accepting a conveyance of other lands, which he shortly afterwards sold for \$6,500 cash. The whole amount of H.'s claim, including the

\$500 paid S. C., did not exceed \$1,500.

In a proceeding instituted by H. against M., this Court on appeal reversed the judgment of the Common Pleas Division, holding that notwithstanding H.'s dealings with the lands he was entitled to enforce payment of M.'s covenant. *Wilkins v. McLean*, 467.

See also **MECHANIC'S LIEN.**

MUNICIPAL ACT.

Sections 570, 574, 584, 587, 589, 592 of the Municipal Act 46 Vict. ch. 18, (O.) [relating to powers of municipal council as to the drainage, &c.] considered and explained. *Dillon v. The Township of Raleigh*, 53.

Sections 525 and 527 of the Act considered.

In re Waldie and The Corporation of the Village of Burlington, 104.

MUNICIPAL CORPORATION.

1. On the petition of the plaintiff and other ratepayers in the township of Raleigh, the municipal council passed a by-law for the construction of the Kersey drain and the assessment of the lands which would be benefited thereby, amongst others those of the plaintiff; and in pursuance of such by-law the amount estimated to be requisite for the execution of the work was raised by such assessment. After the drain had been constructed and accepted by the council from the contractors as completed, a balance remained in the hands of the municipality of about \$2,000, which, in compliance with a petition presented by the plaintiff and other contributories to

the fund, was refunded ratably to them.

The plaintiff had himself been allotted a section of the work for construction, and had been paid therefor, although he had not fully carried out his contract.

Subsequently, and after the defendants had so disbursed the full amount of such assessment, the plaintiff claimed to have discovered that the drain had not been properly constructed according to the plans, specifications and profiles of the engineer employed to lay out the same, and sought on behalf of himself and other ratepayers to compel the municipality to complete the drain according to such plans, &c.

Held, [reversing the judgment of *FERGUSON, J.*,] that the plaintiff being himself a defaulter in the performance of his contract and having been a party to procuring a distribution of the surplus of the fund which otherwise might have been devoted to attaining the object sought by him, could not require the council to execute work which they had not the means to pay for. *Dillon v. The Township of Raleigh*, 53.

[Affirmed in Supreme Court 14th March. 1887.]

2 The judgment of the C. P. D., reported 11 O. R. 319, was unanimously affirmed by this Court, and the appeal therefrom dismissed, with costs. *Gray v. Dundas*, 588.

MUNICIPAL COUNCIL.

A by-law valid on its face was passed by a municipal corporation with the prescribed formalities under 47 Vict. ch. 22, sec. 8 (O.), for exempting the manufacturing establishments of one T. for the period of ten years.

At the time of its passing some negotiations had taken place between the Canada Southern Railway and the authorities of the corporation for the construction of a spur or switch from their railway into the town.

It was proposed on the part of the railway that the town should furnish the right of way and contribute \$1,800 towards the construction, involving as it was stated, an expenditure of over \$6,000.

The council being unwilling to submit a by-law to the people, T., the largest ratepayer in the town, suggested that if his manufacturing establishments were exempted from taxation for ten years, the taxes thereon amounting to about \$280 a year, he would himself, furnish the right of way, and construct the switch.

The by-law was accordingly passed upon this understanding, and T. proceeded with and completed the work.

Held, [affirming the judgment of the Court below] BURTON, J. A., dissenting:—That the by-law was an evasion of the statute, and therefore illegal and void.

Per BURTON, J. A., That the building of the switch in question was an extension or improvement of the manufacturing establishments of T., not dissimilar in principle from that which is usually looked for (where exemptions of this kind are granted) viz., the expenditure of the taxes in the increase of the manufactory, differing only in this, that the benefit was not confined to his own establishments:

That as the exemption might have been granted *mero motu* of the council, the mere circumstance that the manufacturer agreed to make an improvement, which was a public, as well as an individual benefit to

himself and his own manufactories could not invalidate it:

That the case was not brought within the sections giving power to the Courts summarily to quash; and that even if the Courts had power to deal with the question summarily it was a case in which in the exercise of discretion it should not be exercised after the work had been completed, and

Quere, whether the proper course would not have been to apply for an injunction. *Scott v. Corporation of Tilsonburg*, 233.

NEGLIGENCE.

See ARCHITECT—RAILWAY COMPANY, 2.

NOTICE BY PROVINCIAL SECRETARY.

See INCORPORATED COMPANY, 2.

ORDER AMENDING PLAN BY CLOSING STREET.

On the 13th of November, 1883, the judge of the County Court of the county of Halton, in which county the lands hereinafter mentioned were situate, after hearing the several parties interested in the said lands and the streets thereon made an order altering and amending the plan thereof by closing up and declaring closed certain streets and parts of streets: Notwithstanding such order the council of the defendant municipality on the 5th of December, 1883, passed a by-law accepting and declaring open some streets so closed, and authorizing and direct-

ing the road commissioner to remove all fences and obstructions therefrom; whereupon the plaintiff moved for and obtained an order nisi to quash such by-law, which upon argument before Rose, J., (in single Court) was made absolute with costs. On appeal to this Court that order was affirmed, and the appeal dismissed, with costs.

Seemle, that an appeal lies from the order of the Judge of the County Court under the Registry Act, altering or amending a plan. *In re Waldie and the Corporation of the Village of Burlington*, 104.

ORDER APPOINTING LIQUIDATOR.

See WINDING-UP ACT.

PAROL EVIDENCE

[TO VARY WRITTEN CONTRACT, ADMISSIBILITY OF.]

See WRITTEN LEASE.

PAYMENT BY CASH OR NOTE

See SALE OF GOODS.

PARTIES.

When a person suing on behalf of himself and others is disentitled to sue on his own behalf he cannot do so on behalf of the others interested. *Dillon v. The Township of Raleigh*, 53.

——, CLAIM FOR DAMAGES BETWEEN.

See INTERPLEADER.
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PARTNERS.

See PRINCIPAL AND AGENT.

PENALTY OF BOND.

See PRINCIPAL AND SURETY.

PERSONAL LIABILITY.

See INCORPORATED COMPANY.

PLEDGES OF MORTGAGE SECURITY.

See MORTGAGE.

POSSESSION.

See GRANT FROM THE CROWN.

——, CHANGE OF.

See CHATTEL MORTGAGE.

——, DELIVERY OF.

See AGREEMENT TO SURRENDER LEASE.

——, TITLE BY.

See REAL PROPERTY LIMITATION ACT.

POWER OF EXECUTOR TO SELL LANDS OF HEIR.

See WILL, &c.

POWER OF SALE.

The plaintiff, being indebted to the defendants as indorser in the sum of about \$7,000, and being pressed for payment, which he was unable to make, transferred to the defendants certain timber limits, which he stated had cost him \$25,000, to hold as security for his indebtedness, and for the purpose of enabling them to sell it and realise their debt. The regulations of the Crown Lands Department, however, forbade the recognition of any conditional transfer, and therefore the assignment was in terms absolute. The defendants, without adopting any means of ascertaining the probable value of the limits, offered them for sale by public auction, with the assent of the plaintiff, when, no sufficient offer having been made, they were withdrawn, and, without having made any further inquiry as to value, they were sold by private sale, without consulting the plaintiff for \$6,000. The limits were subsequently sold by the purchaser for a very large sum. Previous to the attempted sale by auction the defendants had received several offers of sums more than sufficient to pay off their claim.

In an action brought by the plaintiff against the defendants for selling at a grossly inadequate price, *ARMOUR, J.*, gave judgment in favor of the plaintiff, with \$19,643.38 damages, which, on appeal to this Court, was affirmed with costs, *HAGARTY, C. J. O.*, dissenting, on the ground that, under all the circumstances, there should be a new trial for the purpose of further investigation.

Per BURTON and PATTERSON, JJ. A. The defendants sold by private contract, without authorisation, and did not take proper steps to have the limits valued.

Per OSLER, J. A. The defendants were bound to exercise proper care and discretion, and to adopt such means as would be adopted by a prudent man to get the best price that could be obtained. *Prentice v. The Consolidated Bank*, 69.

PRACTICE,

[RULES 321, 491, O. J. A.]

At the trial the jury answered all the questions left to them in favor of the plaintiff and judgment was entered for him, which the County Court Judge subsequently set aside and entered judgment for the defendants.

Held, that under rule 490 O. J. A., the same power is extended to the County Courts as is possessed by the High Court under rule 321, and that the Judge of the County was right in giving judgment in favor of the defendants, instead of submitting the question to another jury.

See also, on the same point *Stewart v. Rounds*, 7 A. R. 575, and *Williams v. Crow*, 10 A. R. 301. *McConnell v. Wilkins*, 438.

See ALSO EXECUTION.

PREFERENCE OF ONE EXPRESS COMPANY OVER ANOTHER.

See RAILWAY COMPANY 3.

PRINCIPAL AND AGENT.

The defendant W. acted as agent for his co-defendants under a written agreement that no partnership should be created between them, or "the parties held to be partners." To all appearance, however, W. acted as a

partner and as such effected a sale to the plaintiff of a quantity of wine, &c., at ninety days' credit. Subsequently he applied to plaintiff for a loan of money for the purpose, as he stated, of retiring notes of customers of the firm, but which he told the plaintiff he was desirous of concealing from the other defendants, his so-called partners, and for the amount so borrowed he gave the promisory note of the firm :

Held, [affirming the judgment of the court below] that what transpired between W. and the plaintiff when lending the money, was sufficient to shew that the advance had not been for partnership purposes, and therefore that the other defendants were not liable. *McConnell v. Wilkins*, 438.

PRINCIPAL AND SURETY.

On the appointment of M. as cashier of the Ex. Bk. S. & B. became sureties to the bank each by a bond for \$5,000 conditioned for the faithful discharge of his duties as such officer so long as he should continue in the service of such bank &c. After M. had been in the bank for two years and a half he absconded, leaving a deficiency of about \$30,000 occasioned by his misappropriating to his own use the moneys of the bank. In actions brought against S. and the executor of B., who had died during M.'s tenure of the office, the defence was raised that M. had been engaged by the directors in illegal speculations in the stocks of the bank as well as in other stocks and that they had not exercised a proper supervision of his acts, but this objection to the bank's right to recover was overruled and on appeal

to this Court the judgment of the Court below was affirmed with costs.

The bond contained a stipulation that in the event of any sum being found due by M. to the bank interest should be payable thereon from the time an account of the balance due was delivered to the parties to the bond by the bank, and judgment was given in the Court below in excess of the penalty.

Held, however, as the law would not allow a verdict against the obligors for a greater sum than the penalty, interest could not be computed on that amount until after judgment. *Exchange Bank v. Springer and Murray*, 390. *Exchange Bank v. Barnes and Murray*, 390.

See also DEATH OF SURETY.

PRIORITY OF REGISTERED MORTGAGE OVER LIEN SUBSEQUENTLY REGISTERED.

See MECHANIC'S LIEN.

PROCEEDING BY MANDAMUS OR ACTION.

See BONUS TO RAILWAY COMPANY.

PROVINCIAL SECRETARY, [NOTICE OF.]

See INCORPORATED COMPANY, 2.

PROVISIONAL DELIVERY.

See INCORPORATED COMPANY.

PUBLIC UNGRANTED LANDS.

See INDIAN LANDS.

PURCHASE BY SAMPLE.

See **SALE AND PURCHASE.**

—, **SALE AND.**

See **INCORPORATED COMPANY.**

RAILWAY COMPANY.

1. "It is the duty of a railway company to have baggage ready for delivery on the platform at the usual place of delivery, until the owner in the exercise of due diligence can call and receive it; and it is the owner's duty to call for and receive it within a reasonable time." Therefore, where a passenger on arriving at his destination deliberately refrained from applying for his baggage on being told by his cabman that he could not conveniently take it, and on sending for it on the following morning, one of three trunks could not be found:

Held, in an action to recover the value of the trunk and the wearing apparel, it was said to contain, that the liability of the railway company as common carriers had ceased, and [in this reversing the judgment of the Court below] a nonsuit was ordered to be entered.

The only claim (if any) which the plaintiff, under the circumstances, had against the company, was as warehousemen or bailees. *Vineberg v. Grand Trunk R. W. Co.*, 93.

2. M. B. while driving along the highway at the crossing of the G. W. railway in the town of S., operated by the defendants, was killed by a train of the defendants, which was then, as found by the jury, running at a high rate of speed without ring-

ing a bell continuously or sounding a whistle at short intervals. The jury at the trial answered all the questions submitted to them in a manner favorable to the plaintiff and adversely to the company, and negatived any contributory negligence on the part of the deceased.

On appeal it was held by this Court (affirming the judgment of the Court below,) that there was sufficient evidence of negligence to warrant the findings of the jury in favor of the plaintiff.

The deceased had effected a policy of insurance on his life which was in force at the time of his death. At the trial the jury were directed to deduct the amount of the policy from the verdict, which amount was afterwards added by the Divisional Court.

On appeal this Court being equally divided in opinion on this branch of the case, the appeal was dismissed, with costs.

HAGARTY, C. J. O., and OSLER, J.A., were of opinion that the actual loss or injury resulting from the death, can alone be recovered in such a case, and if a large increase of fortune occurs to the parties as a result of such death, or property, or money falls to them as a like result, whether under a settlement or in shape of a life insurance effected for their benefit, that must be taken into consideration in estimating the loss sustained.

BURTON, J.A., was of opinion that under the circumstances the Divisional Court were right in increasing the verdict by the amount of the insurance money.

Per PATTERSON, J.A.—The receipt of the insurance money is a proper matter for the consideration of the Court or a jury in estimating the damages, and might afford ground

for making some reduction from a gross assessment, but in the present case there was nothing shewn to warrant any reduction.

Hicks v. Newport, &c., R. W. Co., in note, 4 B. & S., at p. 403, commented on. *Beckett v. Grand Trunk R. W. Co.*, 174.

3. *Held*, [affirming the judgment of the Court below,] that in the absence of collusion the Court would not inquire into the reasonableness of the rates charged by a railway company to an express company.

Held, also, that the railway company having granted to one incorporated express company the privilege of employing their station agents to act as agents of that express company, such agents having, as employees of the railway company, the right to use the company's trucks and baggage house as places for storing goods; and refused the same privilege to another incorporated express company brought themselves within the provisions of subsec. 3 of sec. 60 of 42 Vict. ch. 9, (D.), which enacts that any railway company granting any facilities to any incorporated express company shall grant equal facilities on equal terms and conditions to any other incorporated express company demanding the same. *Vickers Express Co. v. Canadian Pacific R. W. Co. et al.*, 210.

RATEPAYER AND CON-TRACTOR.

See MUNICIPAL CORPORATION.

RATIFICATION,

[REJECTION OF PAROL EVIDENCE AS TO NATURE OF.]

See SPECIFIC PERFORMANCE.

REAL PROPERTY LIMITATION ACT.

In 1868 B. being the owner and occupant of the east half of lot one in the village of Oil Springs, took possession of the garden, &c., on the west half of such lot on which there was a dwelling house occupied by a tenant, and enclosed the land by a fence with his own lot; and in 1872 the house having been deserted by the tenant or occupants took possession of that also, repaired it and used it as a workshop. In the same year A. who was at one time the owner of such west half removed the doors and windows of the dwelling, and never afterwards returned to the premises. Thenceforth B. remained in undisturbed possession of the house and land, repairing and cultivating the same and also paying the taxes levied thereon until in October, 1884, he sold the property to the defendant.

Held, that B. by virtue of such possession and through B.'s conveyance to him, the defendant, had acquired a good title under the "Real Property Limitation Act." *Seale v. Johnston*, 349.

REASONABLE TIME.

See WRITTEN LEASE.

REDEMPTION.

See LIEN FOR MONEY ADVANCED.

REFERENCE TO ARBITRATION.

See INDICTMENT.

REFUNDING EXCESS OF ASSESSMENT.

See MUNICIPAL CORPORATION.

REGISTRY ACT.

Sections 82, 83, 84, and 85 of the Registry Act R. S. O. 111 considered. *In re Waldie and the Corporation of the Village of Burlington*, 104.

RESULTING TRUST.

A resulting trust arises only in favor of a party paying the whole or an aliquot part of the purchase money: and in such case the trust is of a part of the purchased estate proportioned to the sum paid. No such trust arises from the circumstance of a man making advances on behalf of another who has agreed to buy the estate. *Sanderson v. McKercher*, 561.

See, also, LIEN FOR MONEY ADVANCED.

REVIVOR.

See EXECUTION.

RIPARIAN PROPRIETOR.

See MUNICIPAL CORPORATION, 2.

ROAD ALLOWANCES.

Where the owners of lands, adjoining original road allowances, laid out roads on their lands which were used as public roads for upwards of

eighty years, the original road allowances being all that time in the occupation of the owners of the lands, and used and treated as their own property, and no evidence was adduced to raise a presumption that compensation had been paid to them for the roads so laid out.

Held, [affirming the judgment of OSLER, J.A.,] that the presumption was that the original road allowances had been taken and used in lieu of the roads laid out by the owners through their lands, and that a by-law to open up the original road allowance as of right, was invalid.

Burritt v. Marlborough, 29 U. C. R. 119, approved; *Cameron v. Wait*, 3 A. R. 175, explained. *Beemer v. The Corporation of the Village of Grimsby*, 225.

ROAD COMPANY.

[ACTS REQUIRED TO BE DONE BEFORE INCORPORATION.]

By R. S. O. ch. 152, five persons are allowed, on taking certain steps, to form themselves into a company for the purpose of either making a road or purchasing one already constructed, without the sanction of any authority, executive or judicial. Such proceeding is wholly the act of the parties, and no conclusive force is afforded by the certificate of registration issued by the registrar under the 15th section of the Act.

Therefore, where one W., with his wife and two sons—one a minor—together with another relative, by an instrument in the form required by the statute, executed by them, and duly registered, declared that they had formed a joint stock company (limited) for the purpose of purchasing the roads franchise, &c.,

of the Hamilton and Milton Road Company, &c., with a capital stock of \$5,000, the whole amount of which was subscribed for by these persons, on which they had paid 5 per cent. into the hands of the treasurer of the company—another son of W.—and all five of the shareholders were duly chosen directors; and having thus purported to constitute themselves a company, they purchased the roads from the companies holding the same at the alleged price of \$31,000; and subsequently brought actions to recover tolls said to be due for the use of the roads.

Held, [reversing the judgment of the Court below,] that, by reason of the infancy of one of the subscribers the company had no legal existence at the time of the registration of their declaration of incorporation, and that no subsequent ratification by him after attaining majority could validate his contract, and

Quære, whether the contract was signed by more than *three* persons capable of contracting, as the Married Woman's Property Act [47 Vict. ch. 19, (O.)] did not enable married women to bind themselves personally by their general contracts.

Held, also that the amount of the stock subscribed could not be said to be sufficient in the judgment of the shareholders as required by the statute as a condition precedent to the incorporation of a company to purchase a road. *Hamilton and Flamborough Road Co. v. Townsend, Hamilton and Flamborough Road Co. v. Platt*, 534.

ROADS OPENED ON LANDS ADJACENT TO ROAD ALLOW- ANCE.

See ROAD ALLOWANCES.

SALE AND PURCHASE.

The defendant a manufacturer of woollen goods in company with W., his manager went to the warehouse of the plaintiffs for the purpose of purchasing wool, where he was shewn a quantity consisting of about 200 sacks of white wool which plaintiffs offered to sell at 24c. a pound for the lot. The defendant, after examining as much of the wool as he desired, ordered ten sacks thereof to be shipped to him immediately with the view of trying it, that is, to see if it would produce the quality of goods he dealt in. On the following morning the defendant saw the plaintiff L., personally and informed him that he would take the lot; and the plaintiffs agreed to carry it for him on certain terms, and on that day the ten sacks were shipped to the defendant. At the same time an invoice was sent containing the memorandum: "Terms, interest at seven per cent., from 1st February," being the terms offered to defendant if he would take the lot. The ten sacks were subsequently received at the defendant's mill and were worked up there.

Held, [reversing the judgment at the trial and of the Divisional Court] that the agreement to take the lot made before the performance of the first bargain was a variation of or substitution for the first bargain and that the delivery of the sacks was a delivery and such an actual receipt and acceptance of part of the goods purchased as satisfied the requirements of the 17th Section of the Statute of Frauds, and that the plaintiffs were entitled to recover the price of the remaining 190 sacks together with interest from the date mentioned. *Leadlay v. McRoberts*, 378.

See ALSO INCORPORATED COMPANY.

SALE AT GROSS UNDER VALUE*See* POWER OF SALE.**SALE OF GOODS.**

The plaintiff agreed to sell the defendant a piano for \$400, to be paid by notes at one and two years with interest, with a rebate for cash. The piano was delivered at defendant's residence, who after using it for some time objected to retain it, and refused to give the notes or pay the stipulated price. The plaintiff thereupon sued the defendant in the County Court, claiming the \$400 and interest. At the trial leave was given to strike out the words "with interest."

Held, that the amount was ascertained by the act of the parties, and that defendant having neglected to pay either by notes or cash the plaintiff was entitled to recover in an action for goods sold and delivered. *Greenizen v. Burns*, 481.

SAMPLE,

[PURCHASE BY.]

See SALE AND PURCHASE.**SCIRE FACIAS.***See* EXECUTION.**SEWERAGE.***See* MUNICIPAL COUNCIL, 2.**SPECIFIC PERFORMANCE.**

J. S. F. and his two brothers were joint owners of a lot of land which the former, without any authority from his brothers, agreed to sell to the plaintiff, and for a portion of the purchase money, signed a receipt "Fowlds Brothers," the name in which J. S. F. and one of his brothers carried on business. A watercourse ran through the lot which J. S. F. swore he expressly stipulated should remain open, this, however, was denied by the plaintiff and the receipt was silent in respect to it. The owners refused to execute any conveyance which did not reserve the use of the water, the brothers of J. S. F. swearing that they never would have sanctioned any sale that did not make such reservation, and that they had only approved of the sale effected by J. S. F. on his statement that it had been so reserved.

In an action for specific performance as claimed by the purchaser, PROUDFOOT, J., at the trial, rejected the evidence of the brothers as to the nature of the bargain reported to them by J. S. F., [and which they had ratified], and gave judgment in favor of the plaintiff.

Held, [reversing the judgment at the trial] that the evidence was improperly rejected, and there being no authority to J. S. F. either antecedent or subsequent to bind his co-owners, the plaintiff's case failed, and the action was dismissed, with costs.

At or about the time of the negotiations with the plaintiff it was alleged that other persons had been endeavoring to purchase the lot but failed on the ground that the owners insisted on the reservation of a right to use the water:

Quære, per HAGARTY, C. J. O., whether the evidence on this point

was so collateral in its nature as to justify its rejection by the judge at the trial. *Tracey v. Foulds*, 115.

See also VAGUE AGREEMENT,

SPEED,

[HIGH RATE OF.]

See RAILWAY COMPANY. 2.

STATUTE OF FRAUDS.

The Statute of Frauds not having been pleaded nor any objection properly taken to the sufficiency of the delivery of goods either at the trial or in the order nisi the Court without deciding that there had been a sufficient delivery held that the objection was not open to the defendant and refused to permit an amendment. *Greenizen v. Burns*, 481.

See also SALE AND PURCHASE—SPECIFIC PERFORMANCE.

STATUTES.

B. N. A. Act, secs. 109, 117.]—See INDIAN LANDS.

27 & 28 Vict. ch. 23, sec. 5, sub-sec. 18, (O.)—See INCORPORATED COMPANY.

33 Vict. ch. 21, (O.)—See LIFE INSURANCE.

38 Vict. ch. 16, sec. 14, (O.)—See DOWER.

R. S. O. ch. 107, secs. 17, 19.]—See SALE OF LANDS BY EXECUTORS.

R. S. O. ch. 108.]—See REAL PROPERTY LIMITATION ACT.

R. S. O. ch. 111, secs. 82, 83, 84, 85.]—See ORDER AMENDING PLAN BY CLOSING STREET.

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R. S. O. ch. 119, secs. 1, 6.]—See CHATTEL MORTGAGE—INTERPLEADER.

R. S. O. ch. 152.]—See INCORPORATED ROAD COMPANY.

R. S. O. ch. 174, secs. 525, 527.]—See MUNICIPAL INSTITUTIONS.

41 Vict. ch. 16, (D.)—See TEMPERANCE ACT—APPEAL—JURISDICTION.

42 Vict. ch. 9, (D.)—See RAILWAY COMPANY—EXPRESS COMPANY.

43 Vict. ch. 10, (O.)—See INTERPLEADER—CREDITORS' RELIEF ACT.

45 Vict. ch. 23, (D.)—See WINDING-UP ACT—LIQUIDATOR.

46 Vict. ch. 18, secs. 570, 574, 584, 587, 589, 592, (O.), (*Municipal Act*)—See MUNICIPAL CORPORATION—DRAINAGE.

47 Vict. ch. 19, (O.)—See MARRIED WOMAN SHAREHOLDER.

47 Vict. ch. 39, sec. 8, (O.)—See EXEMPTING FROM TAXATION.

47 Vict. ch. 30, (D.)—See WINDING-UP—LIQUIDATOR.

48 Vict. ch. 14, sec. 6, sub-sec. 3, and sec. 7, sub-sec. 2, (O.)—See DIVISION COURTS & C.—INTERPLEADER.

O. J. Act, Rules 321, 490.]—See PRACTICE.

Statute of Frauds, sec. 17.]—See SALE AND PURCHASE OF GOODS.

STOCK IN TRADE.

See CHATTEL MORTGAGE.

CARRYING ON MARGIN.

See USAGE OF BROKERS.

STOCK IN TRADE.

[INSUFFICIENT SUBSCRIPTION OF.]

See ROAD COMPANY.**SUBSEQUENT EXECUTION.***See* CREDITORS' RELIEF ACT.**SUFFICIENT DESCRIPTION OF GOODS.***See* CHATTEL MORTGAGE.**SUPREME COURT.**

[FOLLOWING VIEWS INTIMATED BY.]

See BONUS TO RAILWAY COMPANY.**SURETY,
[DEATH OF.]***See* DEATH OF SURETY.**SURRENDER OF LEASE,
[AGREEMENT FOR.]***See* AGREEMENT TO SURRENDER LEASE.**TIMBER LIMITS.***See* POWER OF SALE.**TIME NOT OF THE ESSENCE OF THE CONTRACT.***See* AGREEMENT TO SURRENDER LEASE.**TITLE BY POSSESSION.***See* REAL PROPERTY LIMITATION ACT.**UNDERVALUE,
[SALE AT GROSS.]***See* POWER OF SALE.**UNGRANTED PUBLIC LANDS.***See* INDIAN LANDS.**UNLIQUIDATED DAMAGES.***See* COUNTY COURT, &c.**UNSKILFULNESS.***See* ARCHITECT.**USAGE OF BROKERS.**

The judgment of the C. P. D., reported 6 O. R. 505, was affirmed unanimously by this Court, and the appeal therefrom dismissed with costs. *Sutherland v. Cox*, 525.

[Since carried to the Supreme Court.]

VAGUE AGREEMENT.

The plaintiff, suing as assignee of an appeal bond given by the defendants to G. & M. on an appeal which was dismissed, by S. and the N. R. H. company from a judgment recovered by G. & M., claimed the amount of the judgment with costs and interest, less a sum realised by the sheriff on G. & M.'s *fi. fa.* goods by the sale to the plaintiff of a mill

and fixtures erected by the N. R. H. Co., on Crown lands which the company occupied under a letter of license from the Commissioner of Crown lands.

The defendants were shareholders in the company and after the sheriff's sale they and the plaintiff agreed to take steps to reorganise the company the plaintiff to accept shares in satisfaction of his claim. This agreement which the plaintiff had refused to carry out was relied on as a defence to this action.

At the trial the learned Judge held that the agreement was too vague for specific performance and was therefore no defence; and being of opinion that nothing passed by the sheriff's sale to the plaintiff he gave judgment for the whole amount of the original judgment of G. & M. with costs and interest, against the wish of the plaintiff who claimed only the reduced amount.

The defendants moved against the judgment respecting the agreement and a Divisional Court of two Judges while agreeing that it was too vague for specific performance, differed as to its affording a defence to the action.

The plaintiff also moved to reduce his judgment by deducting the amount of his bid at the sheriff's sale, but that order by reason of the Judges not agreeing was not granted.

On appeal by the defendants it was

Held, that the agreement was only to accept shares in case the company was reorganised, and such agreement afforded no defence to this action; and that the judgment could properly be varied by entering it for the reduced amount. The appeal was therefore dismissed, with costs. *Brundage v. Howard, Swinyard, and the Niagara River Hydraulic Co.*, 337.

VARIATION OF BARGAIN BEFORE BREACH.

See SALE AND PURCHASE.

VOTING ON BY-LAW.

See BONUS TO RAILWAY COMPANY.

WAREHOUSEMAN.

See RAILWAY COMPANY.

WATERCOURSE.

[RESERVING USE OF.]

See SPECIFIC PERFORMANCE.

WIDOW'S POSSESSION OF PREMISES.

See DOWER, &c.

WILL,

[CONSTRUCTION OF.]

A testator directed his executors to pay all his "funeral charges and just debts." The residue of his estate and property not required for that purpose he disposed of as follows: To his wife all his household furniture, his pew in a named church, and all cash in hand at his decease, also to his wife the entire, exclusive, and undivided use of his house situate, &c., to hold the same during her natural life, then the proceeds to be equally divided, &c., he also gave and bequeathed the proceeds of the homestead to be equally divided, &c. There were other lands not mentioned in the will.

Held, [affirming the judgment of the Court below] notwithstanding

there was an intestacy as to such unspecified lands that the executors could make a good title to a purchaser thereof, [BURTON J. A., dissenting.]

Per BURTON, J. A. The charge arose only by implication and might be controlled or enlarged by subsequent expressions in the will, and might therefore, perhaps, be extended to lands which the testator disposed of by the will, but the will contained no expression indicating an intention to charge the descended lands, and the executors consequently could not make a good title. *Yost v. Adams.*—129.

WINDING-UP ACT.

An order was made by PROUDROOT, J., in the Chancery Division of the High Court directing the winding-up under 45 Vict. ch. 23, (D., 1882,) of a fire insurance company incorporated by the Legislature of Ontario, and against which proceedings had previously been taken under R. S. O. ch. 160, and the "Joint Stock Companies Winding-up Act, (O.)" This order appointed the receiver in the former proceedings *interim* liquidator, and further referred it to the master to appoint a liquidator, &c., and to settle the list of contributories; and further provided that certain accounts and inquiries which had been made under the previous proceedings, should be incorporated with and used in the winding-up proceedings under the Dominion Statute, in so far as they could properly be made applicable.

Held, (1) that this was an order from which an appeal would lie under sec. 78 of the Act of 1882: (2) [affirming the judgment of the

Court below] that 47 Vict. ch. 39, sec. 2 is not limited in its application to companies being wound up at the date of 45 Vict. ch. 23; it applies also to companies in liquidation that is, insolvent though not technically being wound up, but against which proceedings are being taken to realise their assets and pay their debts; but *Held*,

Per HAGARTY, C. J. O.—Although a valid winding-up order must contain the appointment of a liquidator, the order in question can be upheld as containing the appointment of a provisional liquidator merely, but it was wrong in directing a reference to the master to appoint a liquidator, and also in not providing for notice to creditors, &c.

Per BURTON, and OSLER, J.J.A.—It is essential to the validity of such an order that the liquidator should be appointed in it: Such power of appointment cannot be delegated, but must be exercised by the Judge or officer in making that order.

Per PATTERSON, J. A.—It is not essential to the validity of a winding-up order that the liquidator should be named in it; and a reference to the master for the purpose of appointing one is proper. *Re Union Fire Insurance Co.*, 268.

[Reversed in the Supreme Court, 14th March, 1887.]

WRITTEN CONTRACT.

The defendants in writing offered the plaintiffs to "furnish scows and deliver all the stone required for the Omeme bridge as fast as you require them, for the sum of seventy-five cents per cubic yard," which the plaintiff in writing accepted "at the price and conditions named."

Held, [reversing the judgment of the C. P. D.,] that parol evidence could not be received to shew that the delivery was only to take place in case the water, along the lake and river route over which the stone had to be carried, was of such a height as would enable the defendants to use their steamers in towing the scows. *McNeeley v. McWilliams*, 324.

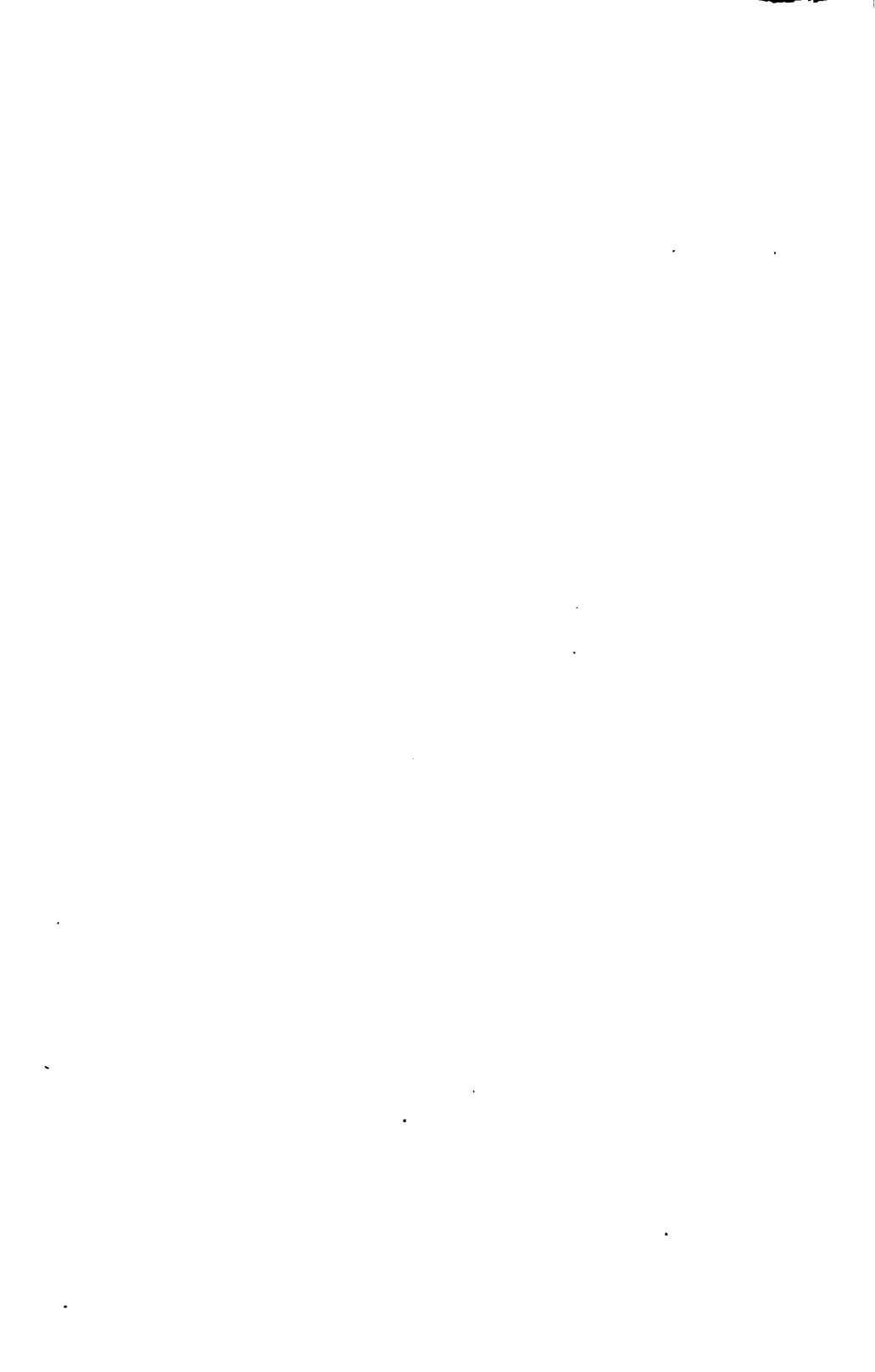
WRITTEN LEASE.

The plaintiff had under several leases been in occupation of a farm of the defendant's for about 25 years. In consequence of the dwelling on the lot having become unfit for occupation by the lessee he notified the lessor of his intention to give up the premises at the end of his term. Thereupon it was agreed that the lessor would put up a new house, the plaintiff agreeing to accept a new lease for six years and pay an increase in his rent of \$150 a year. Plaintiff also agreed to perform some work in connection with the building in

the summer of the first year of the term, and a written lease was executed containing a covenant by the lessor to build a new house "during the said term." The lessor insisted that he had the whole term within which to put up the house:

Held [affirming the judgment of the Court below] that the circumstances attending the execution of the lease as also the corroboration afforded by the lease itself warranted the Court in admitting parol evidence to shew that the first year of the term was the year in which the house was to be erected.

Held, that even if the lease was meant to be silent as to the year for building, a reasonable time would be intended, and that the covenant of the plaintiff being to perform certain work on the building during the first summer of the term, and the increased rent being payable for the whole term then created, the first year must then be considered reasonable. *Bulmer v. Brumwell*, 411.



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